Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

No. 1231

TEXAS STATE TILE & TERRAZZO COMPANY, INC.,
Petitioner,

—v.—

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,073

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

and

TEXAS STATE TILE & TERRAZZO COMPANY, INC., ET AL., *Intervenors*

On Appeal from a Decision and Order of the National Labor Relations Board

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APPENDIX

Decision and Order of the Board

Upon charges filed on January 30, 1967, and February 7, 1967, by Southwestern Construction Company, herein called Southwestern, and on March 17, 1967, by Martini Tile and Terrazzo Company, herein called Martini, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 23, issued a complaint on September 14, 1967, against Plasterers Local Union No. 79, Operative Plasterers and Cement Masons International Association of Houston, Texas, herein called the Respondent, alleging that the Respondent had en-

gaged in and was engaging in unfair labor practices with the meaning of Section 8(b)(4)(i) and (ii)(D) of the National Labor Relations Act, as amended. In substance, the complaint alleges that the Respondent violated the Act by engaging in picketing and other activities at the M. D. Anderson Library project, Houston, Texas, and at the Rainbo Baking Company, Houston, Texas, with an object of forcing or requiring Southwestern and/or its subcontractor, Texas State Tile and Terrazzo, Inc., herein called Texas Tile, and Martini, to assign the work of applying to walls a coat of Portland cement mortar upon which tile was to be installed to employees represented by the Respondent, rather than to employees represented by Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America, AFL-CIO, herein called the Tile Setters. The Respondent filed an answer admitting certain allegations of the complaint and denying certain other allegations.

On October 30, 1967, at a hearing held pursuant to the Complaint and Notice of Hearing, the parties agreed to submit this proceeding directly to the Board for the issuance of findings of fact, conclusions of law, and a Decision and Order. It was agreed that the entire record in this case shall consist of: The Decision and Determination of Disputes, the transcript of testimony, exhibits, and formal papers in the prior 10(k) proceedings,[2] and the transcript, exhibits and formal papers in the present proceeding. The parties waived a hearing before a Trial

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[2] On August 22, 1967, in a proceeding pursuant to Section 10(k), the Board issued its Decision and Determination of Disputes (167 NLRB No. 23), in which the Board concluded that employees of Texas Tile and Martini represented by the Tile Setters were entitled to perform the work in dispute. At no time since the issuance of the Board's Decision and Determination of Disputes has the Respondent given written notification to the Regional Director for Region 23 that it would refrain from forcing or requiring Texas Tile and/or Martini, by means proscribed in Section 8(b)(4)(D), to assign the work in dispute to plasterers rather than tile setters.

Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, and the issuance of a Trial Examiner's Decision. On April 22, 1968 the General Counsel filed a Motion to Transfer Case to the Board. On April 24, 1968, the Board granted the motion.[3]

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Briefs were filed by the Respondents, and jointly by Texas Tile, Martini, the Tile Setters and the Intervenors, which have been duly considered.

Upon the entire record in these cases, the Board makes the following:

FINDINGS OF FACT

1. *The business of the Employers.*

The parties stipulated that:

A. Texas Tile, a Texas corporation with its principal office and place of business located in Houston, Texas, is engaged in the business of installing tile and terrazzo. During the 12-month period prior to the hearing Texas Tile purchased and received goods, materials, and supplies valued in excess of $50,000, which materials were shipped from points outside the State of Texas directly to Texas Tile at points within the State of Texas.

B. Martini, a Texas corporation with its principal office and place of business located in Houston, Texas, is engaged in the business of installing tile and terrazzo. During the 12-month period prior to the hearing Martini purchased and received goods, materials, and supplies valued in excess of $50,000, which materials were shipped from points outside the State of Texas directly to Martini at points within the State of Texas.

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[3] Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

We find that Texas Tile and Martini are engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

2. *The labor organizations involved.*

The parties stipulated, and we find, that the Plasterers and the Tile Setters are labor organizations within the meaning of Section 2(5) of the Act.

3. *The Unfair Labor Practices.*

A. *The M. D. Anderson Library Job*

In 1965, Southwestern, a general contractor, entered into a contract with the University of Houston to construct an addition to the M. D. Anderson Library. Southwestern let a subcontract for the tile and terrazzo work to Texas Tile, which commenced work in August 1966. Texas Tile has a collective-bargaining agreement with the Tile Setters and assigned the work to employees represented by the Tile Setters. At the outset of work in August 1966, the Tile Setters began to apply a coat of Portland cement mortar to receive tile. The Respondent claimed the work. The matter was sent to the National Joint Board for the Settlement of Jurisdictional Disputes. On November 10, 1966, the Joint Board rendered a decision awarding the disputed work to the Respondent. Texas Tile was not bound by the Joint Board decision. The record shows, and we find, that thereafter, the Respondent, through its representative, George Longshore, made several attempts to obtain work in question but Texas Tile and Tile Setters refused to accede to its demands. On January 24, 1967, the Respondent established a picket at the jobsite. The picket sign read as follows:

> Plasterers Local 79 protest the refusal of Texas State Tile and Terrazzo to comply with the National

> Joint Board. Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike, or concerted refusal to work.

In fact, all crafts working on the job honored the picket, causing a complete work stoppage. The picket was removed after an injunction was granted by the United States District Court for the Southern District of Texas, Houston Division, on February 20, 1967. We further find that the Respondent engaged in such picketing with an object of forcing or requiring Texas Tile to change the assignment of the disputed work from its own employees, who were members of or represented by the Tile Setters, to employees who were members of or represented by the Respondent.

B. *The Rainbo Job.*

Martini has a contract with the Rainbo Baking Company in Houston, Texas, to furnish labor and materials for the installation of ceramic tile. Martini delivered its materials to the jobsite on or about March 15, 1967, and began work the next day. Martini has a collective-bargaining agreement with the Tile Setters and assigned the work in dispute to employees represented by the Tile Setters.

On the morning of March 17, 1967, the Respondent established a picket line at the jobsite. The picket sign read as follows:

> Plasterers Local 79, protests substandard conditions Martini Tile Co., Inc., Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or a concerted refusal to work.

Shortly after the establishment of the picket, officials of Rainbo requested Martini to remove its employees from the premises. Martini complied and a work stoppage ensued. Thereafter, the Respondent removed the picket and

picketing was not resumed although Martini returned and continued work on the job. Respondent has stipulated, and we find, that the Respondent engaged in such picketing with an object of forcing or requiring Martini to change the assignment of the disputed work from its own employees, who were members of or represented by the Tile Setters, to employees who were members of or represented by the Respondent.

C. *Respondent's Contentions*

The Respondent's defense herein, as argued in its brief, is in the nature of a request for reconsideration of the Board's Decision and Determination of Disputes issued in the 10(k) proceeding. It argues, *inter alia*, that the word "parties" as used in Section 10(k) does not mean the employer and the two unions or groups of employees claiming the work in dispute need agree upon a method for the voluntary adjustment of the dispute for the Board to quash the Notice of Hearing, but only that the two Unions or groups of employees need agree upon such a method of adjustment, and that since Respondent and the Tile Setters are both subject to the Joint Board's jurisdiction, the Notice of Hearing should have been quashed. We reiterate, however, our consistent interpretation of Section 10(k) that the employer controlling the work assignment as well as the rival unions involved comprise the "parties to such dispute," and all must approve and enter into a voluntary adjustment procedure in order to preclude a hearing and determination pursuant to that Section.[4] Moreover, we note that the Board's longstanding interpretation of this aspect of Section 10(k) was neither questioned nor disturbed when the National Labor Relations Act was most recently

[4] *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 428, AFL (Philadelphia Association)*, 108 NLRB 186, 195-8, Local 450, *and Joiners of America, Local 1622 (O.R. Karst)*, 139 NLRB 591. See also our Decision in the prior 10(k) proceeding, 167 NLRB No. 23, and the cases cited in footnote No. 4 therein.

amended by Congress in 1959. Accordingly, we find no merit in this contention of the Respondent. We have examined the remaining arguments in support of the Respondent's position, and also find nothing therein which was not previously considered by the Board. We perceive no reason for disturbing the prior Decision and Determination of Disputes.[5]

On the basis of the foregoing facts, and the entire record in these cases, we find that the Respondent's picketing of the M. D. Anderson and Rainbo projects as described above was for a proscribed object and in violation of Section 8(b)(4)(i) and (ii)(D).

4. *The Effect of the Unfair Labor Practices Upon Commerce.*

The activities of the Respondent set forth in section 3, above, occurring in connection with the operations of the Employers set forth in section 1, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

5. *The Remedy.*

Having found that the Respondent violated Section 8(b)(4)(i) and (ii)(D) of the Act, we shall order it to

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[5] By motions made on February 21, 1968, "To Correct Record on Material Omissions," and on May 22, 1968, "To Correct 10(k) Record on Material Misstatement", Texas Tile, Martini and the Tile Setters seek to supplement the 10(k) record with various evidentiary matter that is in the nature of new evidence, which is not shown to be newly discovered and previously unavailable. It is clearly not a "correction" of the 10(k) record, or a supplying of evidence to fill an obvious omission in the record. The motions are hereby denied. Previously, on January 17, 1968, the Board denied a "Motion to Re-open 10(k) Record on Issuance of Nationwide Order" filed by the Tile Setters and the two employers, on the ground, *inter alia*, that the assertion that the evidence offered therein was newly discovered and previously unavailable was unsupported.

cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Texas Tile and Martini are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent and the Tile Setters are labor organizations within the meaning of Section 2(5) of the Act.

3. By its picketing at the M. D. Anderson Library job, Houston, Texas, with an object of forcing or requiring Texas Tile to assign certain work (applying to walls a coat of Portland cement mortar upon which tile was to be installed) to employees represented by the Respondent rather than to employees represented by the Tile Setters, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(D) of the Act.

4. By its picketing of the Rainbo Baking Company job, Houston, Texas, with an object of forcing or requiring Martini to assign certain work (applying to walls a coat of Portland cement mortar upon which tile was to be installed) to employees represented by the Respondent rather than to employees represented by the Tile Setters, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(D) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Plasterers Local Union No. 79, Operative Plasterers and Cement Masons International Association of Houston, Texas its officers, agents, and representatives, shall:

1. Cease and desist from engaging in, or inducing or encouraging individuals employed by Texas State Tile and Terrazzo, Inc., or Martini Tile and Terrazzo Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any materials or to perform any services; and from threatening, coercing, or restraining the aforesaid persons, where an object in either case is to force or require Texas State Tile and Terrazzo, Inc., or Martini Tile and Terrazzo Company, to assign the work of applying to walls a coat of Portland cement mortar upon which tile is to be installed at the M. D. Anderson Library and Rainbo jobs, to employees represented by the Respondent rather than to employees represented by Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America, AFL-CIO.

2. Taking the following affirmative action the Board finds will effectuate the policies of the Act:

(a) Post at its business offices, meeting halls, and all other places where notices to employees are customarily posted, in Houston, Texas, copies of the attached notice marked "Appendix".[6] Copies of said notice, on forms provided by the Regional Director for Region 23, shall, after being duly signed by the Union's representative, be posted by the Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail copies of said notice to the Regional Director for Region 23 for posting by Texas State Tile

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[6] In the event that this order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decision of the United States Court of Appeals, Enforcing an Order."

and Terrazzo, Inc., and Martini Tile and Terrazzo Company, the Companies willing, at locations where notices to its employees are customarily posted.

(c) Notify the Regional Director for Region 23, in writing, within 10 days from the date of this order, what steps have been taken to comply herewith.

Dated, Washington, D. C., June 27, 1968

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

SAM ZAGORIA, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO ALL OUR MEMBERS PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT engage in, or induce or encourage individuals employed by Texas State Tile and Terrazzo, Inc., or Martini Tile and Terrazzo Company, or any other person engaged in commerce, or in an industry affecting commerce, to engage in, a strike or refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any materials, or to perform any services, or threaten, coerce, or restrain the aforesaid persons, where an object in either case is to force or require Texas State Tile and Terrazzo, Inc., or

Martini Tile and Terrazzo Company, to assign the work of applying to walls a coat of Portland cement mortar upon which tile is to be installed, at the M. D. Anderson Library job or at the Rainbo Baking Company, Houston, Texas, to employees represented by this Union, rather than to employees represented by Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America, AFL-CIO.

PLASTERERS LOCAL UNION No. 79, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF HOUSTON, TEXAS

(Labor Organization)

Dated ..... By .....

(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, Houston, Texas 77002, (Tel. No. 228-4296), if they have any questions concerning this notice or compliance with its provisions.

Decision and Determination of Disputes

This is a consolidated proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Southwestern Construction Company, herein called Southwestern, and Martini Tile and Terrazzo Company, herein called Martini, alleging violations of Section 8(b)(4)(D) of the Act by Plasterers Local Union No. 79, Operative Plasterers and Cement Masons International Association of Houston, Texas herein called the Plasterers. Pursuant to notice, a hearing was held on April 6, 7, 10, 11, 12, 13, and 14, 1967,

before Donald H. Hicks, Hearing Officer. Southwestern, Martini, the Plasterers, Texas State Tile and Terrazzo, Inc., herein called Texas Tile, and Tile, Terrazzo and Marble Setters Local Union No. 20, herein called the Tile Setters, appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The rulings of the Hearing Officer made at the hearing are free from prejudicial error and are hereby affirmed. All parties filed briefs which have been duly considered.

Upon the entire record in these cases, the Board makes the following findings:

1. *The business of the Employers.*

The parties stipulated that:

A. Texas Tile, a Texas corporation with its principal office and place of business located in Houston, Texas, is engaged in the business of installing tile and terrazzo. During the 12-month period prior to the hearing, Texas Tile purchased and received goods, materials, and supplies valued in excess of $50,000, which materials were shipped from points outside the State of Texas directly to Texas tile at points within the State of Texas.

B. Martini, a Texas corporation with its principal office and place of business located in Houston, Texas, is engaged in the business of installing tile and terrazzo. During the 12-month period prior to the hearing, Martini purchased and received goods, materials, and supplies

[1] The Plasterers and the Tile Setters are parties to the dispute. While Southwestern is the Charging Party in Case No. 23-CD-133, Texas Tile intervened as the employer that assigned the work in that case to the Tile Setters. It participated jointly with Martini and the Tile Setters.

valued in excess of $50,000, which materials were shipped from points outside the State of Texas directly to Martini at points within the State of Texas.

We find that Texas Tile and Martini are engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

2. *The labor organizations involved.*

The parties stipulated, and we find, that the Plasterers and the Tile Setters are labor organizations within the meaning of Section 2(5) of the Act.

3. *The dispute.*

A. The work in dispute is the application to walls of a coat of Portland cement mortar upon which tile was to be installed.

B. *The basic facts.*

CASE NO. 23-CD-133

In 1965, Southwestern, a general contractor, entered into a contract with the University of Houston to construct an addition to the M. D. Anderson Library. Southwestern let a subcontract for the tile and terrazzo work to Texas Tile, which commenced work in August 1966. Texas Tile has a collective-bargaining agreement with the Tile Setters and assigned the work to employees represented by the Tile Setters. At the outset of work in August 1966, the Tile Setters began to apply a coat of Portland cement mortar to receive tile. The Plasterers claimed the work. The matter was sent to the National Joint Board for the Settlement of Jurisdictional Disputes. On November 10, 1966, the Joint Board found that "the work in dispute is governed by the agreement of August 22, 1917, and shall be assigned to Plasterers, except that any coat to be applied wet the same day under tile shall be placed by the Tile Setters. In the

thin-set or adhesive method of applying tile to walls and ceilings, the Plasterers shall apply the first and second coats of mortar, that is the scratch coat and plumb coat. The Plasterers shall plumb, rod and square all walls, rod and level all ceilings and the Tile Setters shall apply the final setting bed for the Tile." Texas Tile was not bound by the Joint Board decision.

Thereafter, the Plasterers made several attempts to obtain the work in question but the Tile Setters refused to accede to their demands. On January 24, 1967, the Plasterers established a picket at the jobsite. The picket sign read as follows: "Plasterers Local 79 protests the refusal of Texas State Tile and Terrazzo to comply with National Joint Board. Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or concerted refusal to work." All crafts working on the job honored the picket. The picket was removed after an injunction was granted by the United States District Court for the Southern District of Texas, Houston Division, on February 20, 1967. The work in dispute was completed by the Tile Setters.

The immediate work involved at the time of the picketing was the application of a second coat of Portland cement mortar (in the stairwell area) upon which quarry tile was to be installed. The Plasterers had applied a scratch coat of plaster (agreed to be Plasterers' work). Then the disputed second coat (called the "brown coat" by the Plasterers or the "float coat" or "setting bed" by the Tile Setters) was applied by the Tile Setters. Both unions claim this latter coat as their own work.

CASE NO. 23-CD-137

Martini has a contract with the Rainbo Baking Company in Houston, Texas, to furnish labor and materials for the installation of ceramic tile. Martini delivered its materials to the jobsite on or about March 14, 1967, and began work the next day. Martini has a collective-

bargaining agreement with the Tile Setters and assigned the work in dispute to employees represented by the Tile Setters.

On the morning of March 17, 1967, the Plasterers established a picket line at the jobsite. The picket sign read as follows: "Plasterers Local No. 79, protests substandard conditions Martini Tile Co., Inc., Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or a concerted refusal to work." Shortly after the establishment of the picket, officials of Rainbo requested Martini to remove its employees from the premises. Martini complied. The Plasterers removed the picket and picketing was not resumed although Martini subsequently returned and completed the job.

The work in dispute is the application of a coat of Portland cement mortar applied directly to metal lathe which was laid over painted brick. The Plasterers contends that this is the "brown coat", which is plasterers' work, while the Tile Setters claims that the coat in question is the "float coat" or "setting bed" which is tile setters' work. The dispute at Rainbo was not submitted to the Joint Board for a decision. Martini filed the charge.

C. *Contentions of the parties.*

The Plasterers admits seeking and demanding, through its representative, George Longshore, assignment of the work in dispute in Case No. 23-CD-133 at a series of meetings with representatives of the Tile Setters, Texas Tile, and Southwestern, but contends it did not violate Section 8(b)(4)(D), as there were no threats to force a change in the assignment of the work in question, and the picket line was established only to protest Texas Tile's refusal to comply with the Joint Board's decision. In any event, it argues, it is entitled to the work on the basis of the skill, relative efficiency, and economy and quality of plasterers' work, area practice, the award

made by the Joint Board in the instant case, and an agreement made between the Plasterers' and Tile Setters' International Unions. It argues that plasterers have always been entitled to the last coat of mortar which is plumbed, rodded, and squared to receive tile. It further contends that the recent introduction of dry set mortars has eliminated the tile setters' traditional setting bed in the one coat and thin set methods, and that the last mortar coat before the application of the tile under these new methods can be called the setting bed only if tile is applied while the coat is plastic or wet; a coat of mortar that is allowed to dry is work properly assigned to plasterers. If the tile is to be applied while this last coat of mortar is still wet or plastic, it does not claim the application of that coat, in the interest of efficiency and economy, since it is serving as a combined conventional setting bed and plumb coat.

The Tile Setters contends[2] that it is entitled to the work in dispute on the basis of the skill, relative efficiency, and economy and quality of tile setters' work; the employer, area, and industry practice; and its contracts with Texas Tile and Martini which explicitly assign the designated work to it. It argues further that it is always entitled to the work of applying the last coat of mortar, which is plumbed, rodded, and squared to receive tile, whether or not that coat is allowed to dry before tile is applied. The Tile Setters admits that it is bound by Joint Board procedures, but contends that the Joint Board award of November 10, 1966, in effect awards the work to it, not to the Plasterers. It points out that the award states that the Plasterers is entitled to the work in dispute on the basis of the original (1917) Green Book agreement between the parties, and that that agreement dealt with the conventional or three coat method of plastering and assigned plasterers the work of preparing ceilings and walls for the Tile Setters setting bed. It urges that the advent of dry set mortars and new con-

[2] Texas Tile and Martini join in the Tile Setters' contentions.

struction techniques has eliminated work formerly within the jurisdiction of plasterers under the conventional method, and when either the one coat (or float coat) method or the thin set method are employed, the last coat applied *is* the "setting bed", which even the Joint Board recognized as the tile setters' work.

4. *Applicability of the Statute*

The charges herein allege violations of Section 8(b)(4)(D) of the Act. The record shows, and the Plasterers does not deny, that between August 1966 and January 24, 1967, its representative, George Longshore, sought and demanded from Southwestern and Texas Tile the assignment of plasterers rather than tile setters to the work in dispute in Case No. 27-CD-133, and that on January 24, 1967, a picket was established at the jobsite which caused a work stoppage by all crafts. In Case No. 23-CD-137, the Plasterers concedes, and the record shows, that it established a picket at Rainbo Baking Company, and urged Martini to assign the application of the coat of Portland cement mortar in dispute to plasterers rather than tile setters, and that a temporary work stoppage occurred as a result of the posting of the picket.

We find there is reasonable cause to believe that violations of Section 8(b)(4)(D) have occurred, and that the dispute is properly before the Board for determination under Section 10(k) of the Act.[3]

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[3] The Plasterers contends that, as the parties had agreed upon a voluntary method of adjustment of the dispute, the notice of hearing should be quashed. It argues that Section 10(k) requires only that the unions or groups of employees claiming disputed work agree upon a method of adjustment. We find this contention without merit. The Board has consistently held that the employer who assigned the disputed work must be a party to an agreement that purports to settle an existing jurisdictional dispute. *Local 450, International Union of Operating Engineers (Painting and Decorating Contractors of America, Houston Chapter etc.)*, 119 NLRB 1725; *United Brotherhood of Carpenters and Joiners of America, Local 1622 (O.R. Karst)*, 139 NLRB 591.

5. *The merits of the dispute.*

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to all relevant factors. The following factors are asserted in support of the claims of the parties herein:

A. *Collective-bargaining agreements.*

Texas Tile and Martini have delegated their bargaining authority to the Tile Contractors Association of America, Inc., and to the Tile, Marble and Terrazzo Contractors of Houston, Texas. The Tile Contractors Association of America, Inc. has a collective-bargaining agreement with the Tile Layers International Union which specifically covers work of the type in dispute. The agreement in pertinent part defines tile layers work covered as: "The application of a coat or coats of mortar, prepared to proper tolerance to receive tile on floors, walls and ceiling regardless of whether the mortar coat is wet or dry at the time the tile is applied to it." Texas Tile and Martini, as members of the Tile, Marble, and Terrazzo Contractors of Houston, Texas, are also parties to a collective-bargaining agreement pertaining to local conditions with Tile Setters Union No. 20 which incorporates the above-quoted work coverage provision. Neither Texas Tile nor Martini has any contract with the Plasterers. Texas Tile does not employ plasterers. A representative of Martini testified that on occasion in the past it has hired plasterers to perform work of the type in dispute, but never without direct supervision of a tile setter. There have been no Board certifications bearing on the work in dispute.

B. *Employer, area, and industry practice.*

The record establishes that, with rare exception, Texas Tile and Martini use tile setters to perform the disputed work. Substantial testimony was offered into the record

by both the Plasterers and Tile Setters setting out specific construction projects in the area on which their respective crafts performed the work in dispute. Evidence as to industry practice was inconclusive. Though area practice by weight of numbers favors the claim of the Plasterers, in our view this factor is outweighed by other factors favoring the claim of the Tile Setters. Thus, the assignments here of the disputed work to tile setters accords with the practice of the Employers, and is not inconsistent with area or industry practice.

C. *Relative skills and efficiency of operation.*

The Tile Setters contends that tile setters are more skilled and more efficient than plasterers in applying a backup coat which is plumbed, rodded, and squared to receive tile, because only a tile setter knows exactly how to prepare a wall to the closest possible tolerance to receive tile. It also contends, as do Texas Tile and Martini, that it is more efficient, especially where only one coat of mortar is to be applied (as on the Rainbo project), to use the same craft for both the mortar work and the tile laying. The Plasterers contends, however, and the record supports its contention, that plasterers are trained to work to as close tolerance as do tile setters. It contends further that plasterers can work faster because they do plastering full-time rather than part-time, and that it is more economical to use plasterers.

The Board is satisfied from the entire record that neither craft can claim superior skill with regard to the application of the mortar bed. Although it appears to be a necessity to use the same craft for both the last mortar coat and the tile laying if the tile is to be set while the last coat is wet, it further appears that where the last coat is allowed to dry before the application of the tile, as was the situation in both cases here, using one craft or two is equally efficient.

Texas Tile's and Martini's assignments, therefore, were not inconsistent with either the relative skills involved, or with efficiency of operation.

D. *Other agreements.*

On August 22, 1917, the Plasterers and the Tile Setters entered into an agreement pertaining to the preparing or plastering of walls and ceilings which are to receive tile in the conventional or three coat method. This agreement provided that ". . . plasterers . . . shall prepare or plaster all walls which are to receive tile. They shall plumb, rod and square all walls and scratch same so as to guarantee adhesion of the final coat which shall be put on by the Tilelayer to act as a bed for his tile." A 1924 award entered in evidence spelled out the division of work in substantially the same terms.

E. *Action of the Joint Board.*

Both the Plasterers and the Tile Setters agree that they are bound by the Joint Board. The Plasterers urges that in Case No. 23-CD-133 the Joint Board awarded the work to them in its decision of November 10, 1966, and its clarification of March 15, 1967. The Tile Setters argues, as seen hereinabove, that the ward favored tile setters and not plasterers. Inasmuch as Texas Tile had not agreed to be bound by any decision of the Joint Board, the decision by that body with respect to the M. D. Anderson project is merely one of the factors which we must consider in assigning the disputed work.[4] In Case No. 23-CD-137, there was no Joint Board award.

In view of all of the circumstances, including its ambiguous nature, and upon the entire record, the Board is of the opinion that the Joint Board award above-mentioned should not be accorded controlling weight.

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[4] *Local 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carleton Brothers Company)*, 141 NLRB 1138; *United Brotherhood of Carpenters and Joiners of America, Local No. 515 (J. O. Veteto & Son)*, 148 NLRB 351.

F. *Conclusions as to the merits of the dispute.*

As the Board stated in the *J. A. Jones* case,[5] it will, in conformity with the Supreme Court's *CBS*[6] decision, determine in each case presented for resolution under Section 10(k) of the Act, the appropriate assignment of disputed work only after taking into account and balancing all relevant factors.

Having considered all pertinent factors, we conclude that employees represented by the Tile Setters are entitled to perform the work in dispute. Tile setters are at least as skilled in the performance of the work as plasterers, and both Texas Tile and Martini, which assigned them to the work, have been satisfied with both the quality of their work and the cost of employing them. Moreover, the instant assignments of the disputed work to tile setters are consistent with the explicit provisions of the collective-bargaining agreement between the Tile Setters and Texas Tile and Martini, are consistent with the past practice of the Employers, and are not inconsistent with area or industry practice. We conclude that the Employer's assignment of the work to the tile setters should not be disturbed. We shall, accordingly, determine the existing jurisdictional dispute by deciding that tile setters, rather than plasterers, are entitled to the work in dispute. In making this determination, we are assigning the disputed work to the employees of Texas Tile and Martini, who are represented by the Tile Setters, but not to that Union or its members.

G. *Scope of the determination.*

The work which gave rise to the disputes has already been completed. The Tile Setters requests an award which would cover the whole United States or, in the al-

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[5] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402, 1410-11.

[6] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union Local 1212 (Columbia Broadcasting System)*, 364 U.S. 573.

ternative, an order covering the geographic area in which the Employers operate. The record will not support a finding, necessary for the granting of a broad order, that the disputes promise to recur between the parties. Our present determination, therefore, is limited to the particular projects at which this instant dispute arose.

DETERMINATION OF DISPUTES

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board hereby makes the following determination of the disputes.

1. Tile layers employed by Texas State Tile and Terrazzo, Inc., and Martini Tile and Terrazzo Company, who are represented by Tile, Terrazzo and Marble Setters Local Union No. 20, are entitled to perform the work (at the M. D. Anderson Library, University of Houston, and the Rainbo Baking Company, Houston, Texas, respectively) of applying the one coat or float coat of Portland cement mortar as backup material to receive tile.

2. Plasterers Local Union No. 79, Operative Plasterers and Cement Masons International Association of Houston, Texas, is not entitled, by means proscribed by Section 8(b)(4)(D) of the Act, to force or require Texas State Tile and Terrazzo, Inc., and/or Martini Tile and Terrazzo Company, to assign the above work to plasterers.

3. Within 10 days from the date of this Decision and Determination of Disputes, Plasterers Local Union No. 79, Operative Plasterers and Cement Masons International Association of Houston, Texas, shall notify the Regional Director for Region 23, in writing, whether it will or will not refrain from forcing or requiring Texas State Tile and Terrazzo, Inc., and/or Martini Tile and Terrazzo Company, by means proscribed by Section 8(b)

(4)(D), to assign the work in dispute to plasterers rather than tile setters.

Dated, Washington, D.C. August 22, 1967

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

SAM ZAGORIA, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD
Twenty-Third Region

Case No. 23-CD-133

In the Matter of:

PLASTERERS LOCAL UNION NO. 79 O. P. & C. M. I. A. OF HOUSTON, TEXAS

and

SOUTHWESTERN CONSTRUCTION COMPANY

Case No. 23-CD-137

In the Matter of:

PLASTERERS LOCAL UNION NO. 79 O. P. & C. M. I. A. OF HOUSTON, TEXAS

and

MARTINI TILE AND TERRAZZO COMPANY

7620 Federal Office Building,
515 Rusk Avenue,
Houston, Texas,
Thursday, April 6, 1967.

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock, a.m.

BEFORE:

DONALD H. HICKS, Hearing Officer.

* * * * * * * * * * *

[33] Mr. Capuano: I will propose the stipulation that on February 10th, 1967, Judge Joe Ingraham, United States District Judge, United States District Court for

the Southern District of Texas, Houston Division, in Case No. 67H-102, Clifford Potter, Regional Director, et al., versus Plasterers Local [34] No. 79, et al., issued a temporary injunction against Plasterers Local 79 as a result of a request by the Regional Director under Section 10(1) of the Act, which was based upon the Charge filed by Southwestern against Plasterers Local 79 in Case No. 23-CD-133.

Hearing Officer: Do you so stipulate, Mr. Carr?

Mr. Carr: I so stipulate, and on the basis of the stipulation, I will withdraw my request for the admission of the documents.

Hearing Officer: O.K. Miss Thacker, do you so stipulate?

Miss Thacker: Yes.

Hearing Officer: The stipulation is received.

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[35] FLOYD WEBB

was called as a witness by and on behalf of Southwestern Construction Company and, having been first duly sworn, was examined and testified as follows:

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Direct Examination

Q. (By Mr. Carr) Mr. Webb, what is your job? A. Superintendent for Southwestern Construction Company.

Q. I take it you are a job superintendent, is that correct? A. Right.

Q. On what job are you now? A. On the M.D. Anderson Library job at the University of Houston.

Q. And how long have you been there? A. Approximately eighteen months, shortly over eighteen [36] months, about twenty-two months.

Q. O.K.

I call your attention to August of last year, August of 1966. Is this approximately the time that the initial tile and terrazzo work was begun at the M. D. Anderson Li-

brary? A. That is about right, approximately on that date.

Q. Who was doing the work? A. Texas Tile people did the work.

Q. And this was Texas State Tile and Terrazzo? A. Right.

Q. And they were having members of which craft do the work? A. Well, Texas Tile employees, in other words, the Texas Tile Setters Union—the tile company was furnishing men which were union members.

Q. And these were tile setters? A. Right.

Q. Union members.

Do you know Mr. George Longshore? A. Yes, sir.

Q. What is his title? A. He is a business agent for the Plasterers.

* * * * * * * * * *

[37] Q. O.K.

Then we will go to January of this year, January of 1967.

Let's back-track. Was there tile and terrazzo work being carried on continuously from August of '66 through January of '67? A. No, sir, they completed, in other words, caught up with the work that could be completed possibly sometime in October, I don't know the exact date, but during October.

Q. O.K.

When did any tile work resume? A. It was in January we received handrails which held up the work and we received our handrails and started possibly the second week in January, thereabouts.

* * * * * * * * * *

Q. Describe basically and briefly the structure, beginning with the first thing that would be put up in the construction of this stairwell, and then each additional elements as it was added to it. A. The first thing, the lather—

[38] Hearing Officer: Just a minute. Let me interrupt you here a second. Are we going, at this point, into the actual work, itself, or are you still confining your questioning to whether or not there is reasonable cause to believe that there is a violation of 8(b)(4)(D) here?

Mr. Carr: I am unavoidably going to touch very briefly on the type of work involved, with the object of establishing that there was a violation of 8(b)(4)(D). I think that the record will have to, to have any meaning whatsoever to Mr. Webb's testimony, will have to reflect very briefly what the work is.

Hearing Officer: O.K.

Mr. Carr: I do not intend to make this a statement or have him testify as to the merits, but just enough so we can have some understanding of what work is involved.

Hearing Officer: O.K. Fine. Go ahead.

Q. (By Mr. Carr) Now, you were beginning to describe the— A. The lathers installed channels and lath on them, and then the plasterer came in and—

Q. Let's get more basic, if we could, for a second. A. All right.

Mr. Capuano: What area are we talking about?

Mr. Carr: We are talking about in the stairwells.

Mr. Capuano: In the stairwells.

[39] Q. (By Mr. Carr) I would presume the first thing that would go up— A. In other words, establishing the wall, the lather sets up a metal channel or a stud and fastens expanded metal on either side that forms your basic background.

Q. That is what I want you to go into. A. And then the lathers—

Mr. Capuano: I am sorry, could I interrupt you? I didn't catch what he said at first about a stud. A. It's a metal stud that your lather fastens on, in other words, in a wall you have got either wood or some support, center support,

Mr. Capuano: This is the center part of the wall?

The Witness: That's right. And you have an expanded metal lath fastened onto this, and after that is completed, the plasterer puts his scratch on or first coat, and then in this case you have got one more coat that follows, which was the float coat, I believe, is the plasterer's term, I mean the tile setter's term, which was used as your coat, setting coat or bed coat for the tile. And that makes your wall up there.

Q. (By Mr. Carr) Now, we are talking about—you mentioned two coats, the scratch coat, which was applied by the plasterer at this job. A. Right.

[40] Q. And then the float coat which, I believe, can be generally agreed, if there was a dispute, was the work in dispute. A. Right, that would be the second coat.

Q. Now, on top of that goes, in this case, what? A. The tile would be your next coat.

Q. What type of tile? A. In this we used quarry tile.

Hearing Officer: What kind?

The Witness: Quarry. It's a square tile. It's about six inches.

Hearing Officer: Is that the brand name or is it the type?

The Witness: It's the type of tile. It's normally used in floor or wall construction.

Mr. Carr: Quarry, q-u-a-r-r-y.

Q. (By Mr. Carr) In the construction of these stairwells do you know approximately when the handrails were first installed and by whom? A. The iron workers installed the handrails. It was, I believe, on a Friday, Thursday or Friday, the first sections were put up.

Q. Do you know— A. The 20th of January, I believe.

Q. In the month of January.

[41] If I show you a calendar would you be able to identify within a few days the Thursday or Friday we are talking about? A. Yes, sir.

Q. All right. A. We started setting the handrails around the 17th or 18th.

Mr. Carr: Let the record reflect that that would be Tuesday or Wednesday.

A. On Tuesday or Wednesday, one. And on Thursday the lather finished putting his metal lath up. And on Friday the plasterer scratched in.

Q. O.K.

So this would be, then, Friday, January 20th, is that correct? A. Right. Right.

Q. This, then, you have testified, that on Friday, January 20th, the plasterers applied what we have previously described as the scratch coat. A. Right.

Q. Was there any work, then, on Saturday or Sunday? A. No work on Saturday or Sunday.

Q. O.K.

Then I direct your attention to Monday, January 23, 1967. Can you tell me in relation to the stairwell if any work [42] was done on that date. A. Yes, sir, the tile setters put their float coat or bed coat on for the tile.

Q. They did no more than that? A. No, sir, that is all.

Q. They let it dry? A. Set overnight, right, sir.

Q. Then I direct your attention to the following day, Tuesday, January 24th. Was any work done in the stairwell on that day? A. No, sir.

Q. Can you give me any reason? A. Well, there was a picket on the job in the morning when we went to work.

Q. Do you know who put the picket out? A. Well, it was by the Plasterers.

Q. Plasterers.

* * * * * * * * * * *

[45] Q. (By Mr. Carr) Mr. Webb, you have heard the stipulation that has been read to the effect that it was not intended that there be a strike. Was there any work done on the project on Tuesday, the 24th of January? A. No, sir, there was no work.

Q. No work done.

Was there any work done on the following day, Wednesday, January 25? A. No, sir.

Q. Did you have occasion on that day to talk with George Longshore?

Hearing Officer: First of all was there any work to be done on the job?

The Witness: Yes, there was plenty of work to be done.

Hearing Officer: O.K. Go ahead.

Q. (By Mr. Carr) Did you have occasion on Wednesday, January 25, to talk to George Longshore? A. He was on the job, yes, sir. We were several there this morning. We were trying to work out a deal where we could go back to work.

Q. You mentioned several. Could you tell us any of the other people that were present? A. Jim Ross from our company was there, Mr. Bruggerman, I believe, Biggerman, Bruggerman, from the Plasterers, Tobin & Rooney Plaster Company was there, and Mr. Zambon from [46] Texas Terrazzo, Tile & Terrazzo Company, was there. And I believe two of his workmen were present at the time.

Q. Was there anybody there from the Tile Setters Union? A. Yes, sir, the business agent, Mr. McHargue.

Q. Mr. McHargue? A. Mr. McHargue was there, right. I get my names mixed up.

Q. Would you describe this meeting? A. Mr. Ross called this to get together to see if we could work together to see when we could go back to work.

Mr. Capuano: I am going to object to why Mr. Ross called the meeting. I think he can tell us what was said.

Hearing Officer: Sustained. Go ahead.

A. Well, this group of men collected at the job this morning, on that particular morning, to try to work out an agreement where we could go back to work there, and we more or less discussed the work that was to be did there, the work involved, and we had some of the tile there, showing the space it had to be in, where the third

coat, and so forth, wouldn't work, in other words, it had to be scratch—

Mr. Capuano: I can't hear you, sir.

A. A scratch coat and one extra coat or float coat was all that you could get on behind the handrail. In other words, you had such a small space there there wasn't no other way to put another coat on, in other words, to level up. And that was discussed around there, and each one stated what was [47] involved there. In other words, the Plasterers were claiming the putting of this coat on next to the tile, and the Tile Setters were using that as their level coat or finish coat to bed their tile to.

Q. (By Mr. Carr) Did Mr. Longshore—you said that he did claim that the second coat directly beneath, in this case because of the tolerance with the handrail would be the coat directly beneath the tile, was to be applied by the plasterers, is that correct? A. Right.

Mr. Capuano: I am going to object to that. I didn't hear him say that. And I think the question, you know, is quite leading, did Mr. Longshore claim—

Hearing Officer: Yes, it is leading.

Mr. Carr: I think it was merely a recitation, a summary of the statements that he had just made.

Mr. Capuano: Well, that is what I thought you were doing, but I don't recall him saying that Mr. Longshore made the statement that you made.

Hearing Officer: It's very difficult for me to understand Mr. Webb, and I am not sure that he said it in that manner. Maybe we better ask Mr. Webb again to speak more slowly and distinctly and tell us again what did happen in that meeting.

The Witness: O.K. We had a scratch coat on the wall [48] ready, in other words, for the bed coat or second coat, and then the next coat, the finish coat, would be your tile, in other words, that would bring you out to your finished wall. In this particular case the tolerance between your handrail and your rough wall or your metal lath wasn't sufficient to get three coats on. In other

words, some areas there was barely room to get your tile on plus about five-eighths of an inch. And so this was the plasterer's, Mr. Longshore claimed, in other words, he already had the scratch coat on, that this next coat or bed coat was their work, too, and if the tile setter put it on he had to cover it with tile the same day that he put his bed coat or float coat on. If it was did the same day the tile setters could do it but if he waited until the next day it was the plasterer's.

Hearing Officer: O.K. Mr. Carr?

Q. (By Mr. Carr) Was there any discussion as to the possibility of putting the tile on the same day? A. It was discussed, right. The tile setter claimed that if he put it on the same day it would be too wet for your quarry tile to bond to it. Quarry tile is a heavy tile and it has to be tapped on and would break your bond, your other coat wouldn't be set sufficient, wouldn't be sufficiently bonded to your scratch coat, and therefore it wouldn't be practical to put it on the same day.

[49] Hearing Officer: At the time of this meeting had the second coat already been applied?

The Witness: In this one little area it had.

Hearing Officer: In one area?

The Witness: Right.

Mr. Carr: I think I have no further questions.

Hearing Officer: O.K. Miss Thacker, do you have any questions?

Cross Examination

Q. (By Miss Thacker) Mr. Webb, you were present at this meeting that you described that took place on the, let's see, the 25th. Who requested this meeting? A. Mr. Ross, I believe, contacted—

Q. Mr. Ross requested it? A. Yes, Ma'am.

Q. And he requested that Mr. Longshore be there, and Mr. McHargue? A. Right.

Q. What was Mr. Longshore's request at that time? A. Well, that they go ahead and put this second coat on.

Q. Why. Why did he want that? What reason did he give? A. Well, he claimed that, as I recall it, a brown coat, in other words, a second coat, which was the plasterer's.

Q. And what kind of tile was to be set therein that area? [50] A. It was the same, quarry tile.

Q. It that a light or heavy weight tile? A. It's a heavy tile.

Q. You have been in the construction business a number of years? A. Right.

Q. Can you set quarry tile on a wet bed?

Mr. Capuano: I am going to object. I think we are getting away from what Mr. Longshore did. Why he did it, I think, would perhaps go to the merits of the dispute.

Hearing Officer: I think so, too.

Miss Thacker: Well, this has to do with the relevancy of the dispute and the claim that Mr. Longshore made at the time, and it has to do with the reason ultimately of Mr. Longshore putting on the picket.

Mr. Capuano: The picket, as I understand it, was on two days before this meeting.

Hearing Officer: Well, go ahead and develop it further, then. We will see where we go.

Q. (By Miss Thacker) Do you remember the question, Mr. Webb? A. No.

Hearing Officer: State it again.

Q. (By Miss Thacker) You say that the setter had put on his float coat? [51] A. Right.

Q. It was wet. The specifications called for quarry tile? A. Right.

Q. Can that be put on a wet setting bed? A. According to the tile men that installed it, it's not practical to. In other words, if the float coat hasn't dried enough to bond in, in other words, if you tap it or move it in any way, which would move in this case—in other words, if it was on a solid wall, it probably wouldn't, but on a lath, metal lath wall, there is some flexibility to it, and this quarry tile has to be tapped on, in other words, to

line up, and that would break your bond between your float coat and your scratch coat, and it would cause it to fall off the wall.

Q. Did they discuss the application of a third coat? A. It was discussed.

Q. And what was pointed out? A. That it wasn't room enough for a third coat to be practical to put on, in other words, some areas you wouldn't have any, at all, there would be less room for it.

* * * * * * * * * *

[55] Q. (By Mr. Capuano) Mr. Webb, do you know what type of contract Southwest had with Texas State Ceramic Tile Company? A. They were sub-contractors to install tile and terrazzo on the job.

* * * * * * * * * *

[56] A. No, sir, I do not.

Q. You don't know? A. No, sir.

Q. O.K.

Do you know whether it is a practice of Southwest to include Joint Board clauses in their sub-contracts? A. No, sir, I do not.

Q. You will have to talk up. A. No, sir, I do not.

Q. You do not know? A. No, sir.

Q. Now, you say Texas State, I will refer to them as Texas State, and I am talking about the Tile company. A. All right.

Q. They had the contract to do the tile work on the job? A. Yes, sir.

Q. Was there terrazzo work to be done, too, on the job? A. We had some terrazzo tread in the stairs only.

Q. I see. That was precast terrazzo? A. Precast terrazzo.

Q. Now, what tile work did they have in their contract? A. Ceramic tile in the rest rooms and the stairwells and floors in the rest rooms and stairs.

Q. All right.

So there was ceramic tile in the rest rooms in addition [57] to this quarry tile you talked about? A. Right.

Q. Now, I believe you indicated that some tile was caught up or the tile company was caught up in October '66 and then came back again in January to continue. A. Right.

Q. Now, what tile was caught up in October '66? A. All of the ceramic tile was completed at that time and the largest part of the quarry tile was completed at that time.

Q. The largest part of the quarry tile, too? A. Yes, sir.

Q. That is in the stairwells? A. Right.

Q. On the floors or walls, or where? A. On the walls.

Q. Was there quarry tile on the floors, too? A. Right.

Q. How many floors is this building? A. Eight stories and a basement.

Q. Eight stories and a basement.

How many rest rooms on each floor? A. There's two on all floors except one, and there is one on that floor.

Q. How many stairwells? [58] A. Four stairwells.

Q. Four stairwells?

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Q. Now, you described for us how the stairwells, the tile was put on the stairwells. Could you tell me how it was put on in those bathrooms? What was the innermost part of the wall first? A. You have got the same plaster, you have got your studs.

Q. Steel studs? A. Steel studs, with metal lath on all walls except one. You have got one wall was fastened on masonry.

Q. Was that the outside wall? A. Outside wall, exterior.

Q. Was that concrete block? A. Concrete.

Q. Just concrete? A. Concrete wall.

Q. All right.

You put metal lath on the studding and on the masonry, right? A. Right.

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[60] A. Well, they put it with a cement mastic that they mix up and put on the back of it and put it on it.

Q. Do you know the name of that mastic they used? A. No, I do not. I am not involved in that. It's mixed with the cement.

Q. This mastic was mixed with the cement.

Now, you talked about these handrails being put in by the iron workers on the 17th, on Tuesday, and then on Thursday the lath was put on. You are talking about the lath in the stairwells? A. Right.

Q. Now, was there concrete walls in some of the walls of the stairwells, too? A. Yes, the exterior wall, you would have one wall, right.

Q. Would be concrete and then the others would be steel studding with metal lath? A. No, most of your stairs, your exterior walls are masonry and your interior walls was metal lath with studs with the lath on them.

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[66] Q. Now, do you recall at this meeting on the 25th any comments being made by anyone to Mr. Longshore that he could fill in the voids in these walls in the stairwells, in other words, if the wall, after the mortar was put on by the tile setter, wasn't plumb, that he could— A. The walls were already completed at that time.

Q. No mention made of that? A. There was no work on the walls at that time.

Q. O.K.

Now, you said that the tile setter claimed he could not put the quarry tile on the wall the same day that the mortar was put on, is that right? A. And get a good job of it, no, sir.

Q. This is what the tile setter said? A. Right.

Q. And this is what you were going by, what he said?

A. Well, I figured him as a qualified expert, I mean, in [67] that line of work.

Q. Right. So you were paying attention to what he said. A. I was taking his judgment as being correct.

Q. O.K.

Now, you say there wasn't room enough for a third coat. A. No, sir, that's right.

Q. What did you mean by that, the thickness of the wall would be too great to put a third coat on? A. Well, you would have to see the wall to understand the situation. I mean, on the next job it might not be that way, but this particular place where your handrails went on, it was a metal piece installed inside the wall that you anchored to, which taken up possibly a half, three-eighths to a half inch of your wall space, and the tile and everything had to work over that, your lath.

Q. You had to anchor your handrail into what? A. Into the steel framing in your wall.

Q. To the steel framing, right? A. Right. You couldn't just anchor it to the plaster. You had to have a support in there. And this support taken a part of the wall where the plaster normally would have went or your back-up would have went.

Q. You mean that support would only be maybe a half an inch long so you couldn't go out two inches on the wall, is that what you are saying? [68] A. We only had an inch and a half, approximately, to start with.

Q. Right. A. Finish, that is, from your rough metal lath to your finished product.

Q. An inch and a half? A. Something like that, at the best. By the time you get your metal lath, scratch coat, and then if you protruded out another three-eighths of an inch with a piece of metal, you would have scant room to get a five-eighths space there left, and your tile is approximately a half-inch thick so you can see you only had—

Q. Was there any space there in the stairwells where you used more than an inch of mortar or an inch and a half of mortar? A. There's some places, yes, sir.

Q. Up to two inches? A. No, there's no place you had two inches. You only had an inch and a half to start with.

Q. Even on the masonry walls, is that right? A. Well, I wouldn't say there wasn't holes in there where you had that much depth. Usually rough concrete has three holes.

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[74] Recross Examination

Q. (By Miss Thacker) Mr. Webb, was there a work stoppage, a complete work stoppage, after the picket was placed? A. That's right.

Q. Was there still a work stoppage, a complete work stoppage, after the location of the picket was moved? A. That's right.

Q. And that continued until the time of the injunction? A. Well, it was a few of the crafts went back on to work but the majority of them was off until the injunction.

Q. Can you state to your knowledge that Texas State Tile & Terrazzo did give the work assignment and it was being carried out to the tile setters, members of Local 20? A. That's right.

Q. And can you state that demand was made in your presence or you were aware of a demand being made by Mr. Longshore that that work assignment be given to the plasterers? A. Right.

Hearing Officer: What work assignment?

Miss Thacker: According to the contract between Texas [75] State and Southwestern.

Hearing Officer: From your information that you know, what work assignment was Mr. Longshore asking for?

The Witness: He was asking for the brown coat or second coat of plaster on the rest rooms and stairs.

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[76] Q. And you knew what work Mr. Longshore was claiming, what work was in dispute, didn't you? Didn't you just tell the Hearing Officer what work Mr. Longshore was claiming? A. Right, in other words, he was claiming the second coat or brown coat of plaster there.

Q. Or the first coat on concrete block or masonry, right? A. Right.

Q. And the Joint Board award other than giving the wrong building name gave that work to Mr. Longshore, didn't it, and the Plasterers? A. Well, it depends on whether you was a plasterer or whether you was a tile setter.

Q. I am saying that, I think you understood what I said, I said that the Joint Board in that decision you saw gave the work to the Plasterers, didn't it? A. Right, but the Tile Setters had already informed they wouldn't abide by the decision before it was ever rendered.

Q. The Tile Setters said they wouldn't abide by the decision before it was rendered? A. That they wasn't a member, no.

Q. All right.

But you did understand what work the Joint Board gave to the Plasterers, didn't you? A. Not in that particular building. Our building wasn't [77] mentioned on it. I mean, what dispute they had in some other building, that had no bearing on the case there.

Q. O.K.

When Mr. Carr asked you the question I believe he phrased it assuming that the Joint Board had said the Anderson Library, right, isn't that the way he phrased his question to you? A. Something like that.

Q. All right.

So we were assuming we were talking about the Anderson Library in the Joint Board award, weren't we? A. I guess that's right.

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[80] JAMES K. ROSS

[81] was called as a witness by and on behalf of the Tile Setters and, having been first duly sworn, was examined and testified as follows:

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Direct Examination

Q. (By Miss Thacker) What is your position and what company are you with, Mr. Ross, please? A. Vice President Southwestern Construction Company.

Q. Who has the sub-contract on the Anderson Library building at the University of Houston for the tile work? A. Texas State Tile & Terrazzo.

Q. Are you aware of what work assignment they made, to what craft they made the work assignment? A. Yes, I am aware.

Q. Who was it? A. To the Tile Setters.

Q. Were there any requests or demands made to you or to any of your employees by the business agent, Mr. Longshore, of the Plasterers for that work assignment? A. For part of the work the Tile Setters were doing. There was none made directly to me. I had heard from the job that there was, in late summer, a question about part of the setting.

Q. Was a picket established by the Plasterers? [82] A. There was a picket put on the job by the Plasterers, yes.

Q. What was the date? A. To the best of my knowledge it was in the morning of January 24, this year.

Q. Did you request a meeting with Mr. Longshore and the Business Agent of the Tile Setters and other interested parties as a result of this? A. I did. I think the following day, in the morning, I tried to get all the parties who were interested together to see if they could meet on the job and establish specifically what the questions were and try to resolve them.

Q. At that meeting did Mr. Longshore make his position clear to you as what his request was? A. I think reasonably so, yes.

Q. What was it, please? A. I might say that all the work that the tile contractor had to perform was, at that time, completed except for the balustrades and the stair treads, rises and landings, had been completed, and that the question remained at that time who should put the coat of plaster directly over the scratch coat on the balustrades of the stairwells.

Q. And he specifically asked that this work be assigned to the Plasterers? A. Yes, to my knowledge he demanded it.

[83] Q. Was there a work stoppage as a result of the picket? A. Unquestionably.

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[88] So even though this decision refers to the science building you knew that was a mistake and it was referring actually to the library building, didn't you? A. I would—I could assume that.

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[90] Q. And what type of contract did you have with Texas Tile? A. We had a lump sum contract for a prescribed amount, a defined work area of work.

Q. And did that— A. Which did include, which was based on the way the [91] specifications and plans were written.

Q. Did it have any provision in there for binding Texas Tile to the Joint Board? A. It did not.

Q. There was no provision saying that Texas Tile was bound by all the terms of the general contractor's agreement with the owner or anything like that? A. No.

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[92] Q. So as far as you know there was nothing in your own contract with Texas Tile binding them to the Texas Board? A. I know there was nothing—

Q. I can't hear you, sir. A. I know there was nothing in my contract, and I haven't found anything in my contract with the owner that would require it.

Q. Have you checked the general conditions to see if there was anything on settlement of jurisdictional disputes? A. Yes.

Q. And there was nothing in there either? A. I can't find it.

Q. O.K.

Now, you say that Longshore was asking for the coat of mortar on the balustrades, I believe is the way you put it. A. At the time I met him the only work remaining, as I told you, was, that the tile setter had to do, was the quarry tile on the balustrades.

Q. What are you talking about, balustrades, now? A. That's the center rail on the stair.

Q. Yes, I know that. Balustrades are usually small— A. Well, the dividing, this was a solid—

[93] Q. You are talking about a partition, aren't you? A. Small partition.

Q. Right. A. Handrail at the center of a stairwell.

Q. Right.

That was about four or five inches wide, was it? A. Well, I don't remember how wide.

Q. Yes.

They weren't individual posts that we were claiming? A. No, it was a solid, low wall.

Q. Right, solid, low wall. And what were the plasterers or what did you understand Mr. Longshore was claiming, then? A. An additional coat of plaster over the scratch coat.

Q. All right.

Now, this is what the Plasterers were claiming all along, wasn't it, the second coat of mortar on the scratch or the first on the block? A. I presume that is what they were, this was my first contact with him directly, and I presume that that is what he had a question about, yes.

Q You hadn't heard from anybody else prior to that? A. I had heard from our superintendent that there had been a discussion on the job prior to that time.

Q. And that was Mr. Longshore's claim, then? A. I didn't hear it directly from Mr. Longshore, but I think [94] that is where it came from, yes.

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[97] Q. You knew it applied to that job, didn't you? A. Probably so.

Q. Did Mr. Zambon tell you he even wrote to the Joint Board and told them they made a mistake in— A. I think he did, yes.

Q. So to finish my question, told the Joint Board that they had the wrong job listed on their decision, and your answer to that was yes, he did? A. Well, they didn't change it.

Q. Pardon me? A. They didn't change it even March 15, as I recall.

Q. That's right, they didn't change it, but he told you that he wrote this telegram or letter? A. I believe he did. I did not send them anything on it.

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[101] G. ZAMBON

was called as a witness by and on behalf of the Tile Setters and, having been first duly sworn, was examined and testified as follows:

Hearing Officer: Give the reporter your name and address, please.

The Witness: My name is G. Zambon, and I am President of the Texas State Tile & Terrazzo, Incorporated, of Houston, Texas.

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[102] Direct Examination

Q. (By Miss Thacker) Mr. Zambon, were you the subcontractor on the library building at the University of

Houston on which Southwestern Construction was the general contractor? A. Yes.

Q. What work assignment did you make in this particular contract? A. Assignment to—

Q. The craft, what craft did you give the work assignment to in this particular work? A. To the Tile Setters, Local No. 20.

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[103] Q. (By Miss Thacker) Was there a picket established on the job? A. Yes.

Q. And did all work stop as a result thereof? A. Right.

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Cross Examination

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[107] Q. O.K.

Now, you realize some time between the date of that telegram and sometime in January, anyway, that the dispute was really over the Anderson Library, didn't you, not a science building? A. Well, I presumed that is what it was, that is true. [108] I presumed it was over the M. D. Anderson Library.

Q. Right. And it was just a mistake on the Joint Board's part calling it the science building, or a mistake on somebody's part. A. That is what I presumed, yes, sir.

Q. Right. And in fact, in January you sent the Joint Board another telegram correcting it for them— A. Correct.

Q. —so that it would say Anderson Library, right? A. Correct.

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[110] Redirect Examination

Q. (By Miss Thacker) Mr. Zambon, you have stated for the record that you are not bound by any decisions by the National Joint Board. A. Correct.

Q. You belong to the local chapter of Tile Contractors? A. Yes.

Q. Do they bind themselves to the decisions of the National Joint Board? A. No.

Q. You are a member of the National Contractors Association? A. Yes.

Q. Do they bind themselves to any decisions of the National [111] Joint Board? A. No.

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[112] TOM ZAMBON

was called as a witness by and on behalf of the Tile Setters and, having been first duly sworn, was examined and testified as follows:

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[113] Direct Examination

Q. (By Miss Thacker) Mr. Zambon, what is your position with Texas State Tile & Terrazzo? A. Tile setter.

Q. You were foreman on the library job at the University of Houston? A. Yeah.

Q. Did Mr. Longshore, Business Agent of the Plasterers Local Union 79, ever approach you in connection with the work there? A. Sure, quite a few times.

Q. To whom had you made the work assignment? A. To the Tile Setters.

Q. To the Tile Setters, Local Union 20? A. To No. 20, yes.

Q. And Mr. Longshore asked you for the work, that it be assigned to his plasterers? A. Yeah.

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[118] Q. All right.

Now you are talking about over metal lath right where you put— A. Over metal lath, that's right.

Q. Right. And on the block there wasn't a scratch coat, just a coat of your mud. A. The block was the same thing, the stairwells over there, they were on mesh.

Q. Wait a minute, now. We are talking about the bathrooms. A. Well, you talked about the stairwells a while ago.

Q. No, I talked about the bathrooms. A. Well, the bathrooms I use the same principle.

Q. Yes, I realize that, but on the lath you had the scratch coat put on by the plasterers? A. That's right.

Q. And the coat you put on and then you put your tile on. A. That's right.

Q. And the concrete block, the wall that was the exterior wall, concrete wall, you put on just a coat of mud for the tile setters. A. Right, one coat.

Q. One coat, and the tile setters put that on? A. That's right.

Q. Now, how did you put your tile on? [119] A. With cement.

Q. What kind of cement? A. Cement that get a good bonding on my tile.

Q. You put that on the next day, though. A. The next day, yes.

Q. Did you wet your tile? A. Huh? They don't have to be wet.

Q. What did you use— A. Not the quarry tile. Quarry tile don't have to be wet.

Q. I am talking about the bathrooms. I haven't asked you about the stairwells. A. Well, you went back over on the stairwells on the exterior walls.

Q. I didn't say anything about the stairwells. You have an exterior wall in the bathrooms, too, don't you? A. Yeah.

Q. Well, that is what I was talking about. Now, what did you put in the cement that you used the next day? A. I used some compound there to slow my cement, that is all. I have been doing it for forty years.

Q. You have been using that compound for forty years? A. That's right.

Q. What kind of compound was it? A. Well, it's concentrate.

Q. What is the name of it? [120] A. Concentrate. That is what is the name of it.

Q. Has it got a commercial name to it? A. They have got a lot of different names.

Q. What kind were you using? A. Concentrate.

Q. That is the name of it, just concentrate? A. That's right.

Q. No brand name to it? A. No.

Q. No brand name on it? A. I don't know. What brand name it got? They have got concentrate on it. What is the difference, anyway?

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[122] Hearing Officer: On the record.

In an off-the-record discussion it's my understanding that where you have a concrete wall a coat of mortar or plaster, whatever you want to call it, is attached to the concrete wall. This is called a brown coat by the Plasterers [123] and a float coat by the Tile Setters. Now, is this work that the plasters are claiming as their work?

Mr. Capuano: Yes.

Hearing Officer: And Miss Thacker, is this work that the Tile Setters are claiming as their work?

Miss Thacker: Yes.

Hearing Officer: Now, in a situation where you have metal lath, a coat of plaster or scratch coat, which this is called, I believe, is attached to the metal lath. Now, to my understanding there is no dispute that this is Plasterers' work, but then another coat may be applied to this scratch coat, and this is called a brown coat by the Plasterers and a float coat by the Tile Setters. Now, this brown coat or flat coat, as it's called by the Tile Setters, do you claim this as your work, Mr. Capuano?

Mr. Capuano: Yes, we do except that I think we have to go one step further. I don't think we covered that in the off-the-record discussion. We claim it if the tile is not set on that brown coat the same day.

Hearing Officer: I see.

Mr. Capuano: In other words, if they can set their tile the same day in that brown coat, we also call it the

plumb coat, then we would not claim it or, as I said earlier, we claim it but we do not raise any dispute about it.

But if the tile is not going to be set in the brown coat [124] while it's still plastic or wet, in other words, you are going to come back the next day and set the tile, then we claim that brown or plumb coat, yes, sir.

Hearing Officer: I see.

Miss Thacker: It is our contention that it is irrespective of whether that coat is wet or dry, that it belongs to us, and that that is the decision of the tile contractor to make as to when he wants to apply his tile.

Hearing Officer: O.K. Well, we won't get into that.

Miss Thacker: No.

Hearing Officer: It's just the fact that you are claiming this work that we talked about.

Miss Thacker: Yes.

Mr. Capuano: Excuse me. That would also apply even when there is one coat on concrete walls or masonry, too. In other words, if they can apply their tile while it's wet, we would not raise any question about it either, and to clarify it a little further, when we said concrete walls that is what we had here, but we are talking about any sort of masonry, concrete block, clay tile, brick, even, if you have brick. In other words, any hard masonry surface.

Hearing Officer: I see. And so maybe the record will be clear, we talked about the conventional method that is used. So would somebody please describe that?

Mr. Capuano: Yes.

[125] In taking the same situation, metal lath over studding, you know what the studs are, the two by fours running up and down, or steel studs, you would have a scratch coat on the metal lath to stiffen it, one coat.

The second coat would be a plumb coat or brown coat, which would be put on to plumb and square the room, plumb the wall, make it straight.

Those two, I believe will be agreed, are Plasterers' work.

The third coat will be put on by the Tile Setters and he beds his tile in that. That is his setting bed. That would be the conventional method.

Miss Thacker: There is one qualification on that, which I presume was just an omission, that your final coat is scratched.

Mr. Capuano: Our final coat is scratched?

Miss Thacker: Yes.

Mr. Capuano: You are talking about the plumb coat?

Miss Thacker: In any application that you make.

Mr. Capuano: If the tile setter wants it scratched we scratch it, that's right.

Miss Thacker: Your final coat is scratched, according to the agreement.

Mr. Capuano: If it's supposed to be scratched, yes.

Miss Thacker: The agreement says it's to be scratched.

[126] Mr. Capuano: Well, the decision doesn't say it has to be scratched.

Miss Thacker: The 1917 says it has to be scratched.

Mr. Capuano: Look at the 1924 decision.

Miss Thacker: It says scratched.

Mr. Capuano: No, it doesn't.

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[127] Mr. Power: Mr. Hearing Officer, if we may, we certainly have no objections to using the words that we have to scratch the plumb coat.

Miss Thacker: All right.

Mr. Power: But being practical, being in the business, myself, many times a tile setter will say don't scratch it. It's in the agreement to be scratched for his setting bed, but many times they will tell you not to scratch it.

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[128] GEORGE LONGSHORE

was called as a witness by and on behalf of the Plasterers and, having been first duly sworn, was examined and testified as follows:

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[129] Direct Examination

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Q. Did you learn that tile setters were performing work that you as a plasterer considered to be within your jurisdiction? A. Yes, sir.

Q. When did you learn that, approximately? A. Oh, I wouldn't know just exactly, Mr. Capuano, what the exact date was.

Q. Well, was it in the summer or fall of '66? A. Oh, no, it was definitely in the fall of the year.

Q. Fall of '66? A. Yes, sir.

Q. All right.

[130] And after you learned this what did you do, who did you talk to? A. I contacted the Tile Setters' business agent.

Q. All right. And what did you do next? A. And we met on the job.

Q. You met with the Tile Setters' business agents? A. Yes, sir.

Q. Anyone else? A. And Mr. Tom Zambon.

Q. All right.

And at that time did you make a claim for this work? A. Yes, sir.

Q. And did Mr. Zambon make any reply to you when you told him this was your work? A. Well, only to what Mr. Zambon's testimony here was correct.

Q. What did he say? A. That the work belonged to him and he was going to do the work regardless of when the tile was set.

Q. All right.

And after this were there any other meetings held on the job site? A. Doug and I met out on this job a couple of times.

Q. Doug who? A. The Lathers—the Tile Setters' business agent.

[131] Q. Over this same thing? A. Yes, sir.

Q. And— A. And then at a later date I met out there with out International representative, Mr. B. F. McCullen, and myself and Brother Doug, International Representative Joe Marsak, and at that particular time the superintendent of the building, I don't believe that Mr. Webb took any part in the conversation that was between the two International Representatives and the two Business Agent Representatives, but Mr. Webb was in the vicinity of this meeting.

Q. All right.

And did that meeting resolve this problem? A. No, sir.

Q. All right. And after that what did you do? A. I filed a Complaint and went through the regular procedures and filed a Complaint with the Board for the Settlement of Jurisdictional Disputes.

Q. The Joint Board? A. The Joint Board, yes, sir.

Q. All right.

Now, when you filed the Complaint did you file the Complaint with your International Union? A. Oh, yes, sir.

Q. And then they processed it for you, is that correct? [132] A. Yes, sir.

Q. Through the Joint Board? A. Yes, sir.

Q. Now, when you filed your Complaint with your International Union what name did you give to this job? A. Through an error of the Plasterers foreman on that job, that is where the science building and this library was a mix-up, I asked the Plasterers foreman on this particular job what was the name of the building, and he was working prior to this across the street, and through a fault of his he said the science building, or through a

misunderstanding of mine, we did call this library the science building.

Q. But you were referring to the library? A. Yes, we were both referring to the library, yes, sir.

Q. Now, when you got the decision of the Joint Board, and I assume you did get a copy of it. A. Yes, sir.

Q. I believe that is right in front of you as Plasterers' Exhibit 3, is it? A. Yes, sir.

Q. That is the decision of November 10th, 1966. A. Yes, sir.

Q. What did you do then? A. Well, I got hold of, probably went first out on the job and talked to Tom.

[133] Q. Tom who? A. Mr. Zambon. And as Tom says, they don't abide by the Joint Board decisions. And then I got hold of Doug, and I think it was about this time that we were talking about an agreement that existed that I didn't have a copy of. And I believe this is about this date. We went over to Mr. Zambon's office, and I don't recall the correct address of it, but Mr. Zambon wasn't in at this particular time, and that is the only time that I have ever been to their office.

Q. All right.

Did you ask Mr. McHargue to do anything after you got this Joint Board decision? A. Oh, yes.

Q. What did you ask him to do? A. Well, I asked Mr. McHargue would he abide by the Joint Board decision.

Q. And what did he say? A. And he informed me that he could not abide by the Joint Board decision.

Q. O.K.

Now, did you notify your International Union as to the Tile Setters' answer, that they wouldn't comply with the Joint Board decision? A. Well, I think that after I talked to Brother Doug and Tom Zambon, and they informed me that they couldn't abide by [134] the Joint Board decision, I also talked to Mr. Webb about this. Then I imagine the next day I put the picket on the job.

Q. On January of '67— A. After the decision was handed from the Joint Board.

Q. You mean after they told you—you say they couldn't comply with the— A. Comply with the Joint Board decision. And after the Joint Board rendered its decision and then I couldn't come to any agreement with Brother Doug or with Tom Zambon, then I did put the picket on the job.

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[152] ADOLPH N. MARTINI

was called as a witness by and on behalf of Martini Tile and Terrazzo Company, and having been first duly sworn, was examined and testified as follows:

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Direct Examination

Q. (By Miss Thacker) What is your position with the Martini Tile and Terrazzo Company, please? A. I am president.

Q. Did you have a direct contract for certain tile installation at Rainbo Baking Company? A. Yes.

Q. To whom did you make the work assignment for this work to be done? A. To the Tile Setters.

Q. Do you have a collective bargaining agreement with them? A. Yes.

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[154] Q. In your contract with Rainbo are you bound by the National Joint Board? A. No.

Q. Are you a member of the local Tile Contractors Association? A. Yes.

Q. Are they bound by the National Joint Board? A. No.

Q. Are you a member of the National Tile Contractors [155] Association? A. Yes.

Q. Are they bound by the National Joint Board? A. No.

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[156] Hearing Officer: So let me read that over and see if we can get a stipulation as to that being the words:

"Plasterers Local No. 79 protests sub-standard conditions, Martini Tile Company, Incorporated. Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or a concerted refusal to work."

[157] Do you stipulate that that is what the sign said?

Mr. Capuano: Yes.

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[159] Q. And when did your men go back on the job? A. They went back the following week-end because Rainbo was tied up during the week. See, this is a remodel job and we had those people shut down for a while, and we couldn't work in the daytime, it had to be done in the latter part of the week when they could shut down a certain portion of their equipment, and we had to get in there and get out of it.

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Q. Then when did you start the job back up again, Mr. Martini? [160] A. We started the tile up the following Friday.

Q. The following Friday? A. Yes.

Q. So then it was from March 17 when the picket was initially put up and then you started up the following Friday. A. That's right.

Q. And you completed it. Or is there more work that you have to be done on that particular job, or are you completed with it? A. No, no, there is quite a bit of work that is going up there, and they are putting tile wainscoting from the floor to the ceiling, which is about twelve feet high, and we have to do it just at times when the spaces are available, that they can turn over to us, but they are going to tile the entire building before it's over with.

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Hearing Officer: I think, so that the record will be clear, I think maybe we ought to define the work that was being done by the tile setters at the time Mr. Longshore came to you.

Now, just briefly. Don't go into too much detail.

The Witness: Yes. I might explain it in this manner, that this is a remodeling job, and they have painted brick walls in there, and some of the paint is very heavy on there, [161] and rather than to chip the paint off and create a lot of dust hazard, and one thing and another, in the bakery, we elected to nail metal lath over the brick walls with concrete nails, and following that we put our setting bed on there, which was approximately a half inch thick. And then in floating those large walls up we had a lot of equipment to work around, and we had to go from the floor to the ceiling. In order to get a straight line, to strike our lines on the walls, to keep the walls straight, we used on top of the lath, we used wood lath strips that we float our mortar on in a conventional manner to form our setting bed.

Then when the Rainbo people would let us go back in there sometime the following day, sometimes a little bit later, we would set our tile on our setting bed. Sometimes we could do it the same day. Sometimes we couldn't.

Hearing Officer: This setting bed you are talking about is what you believe Mr. Longshore was referring to when he asked you to give this work to the Plasterers, is that correct?

The Witness: Yes, that is correct.

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[167] Hearing Officer: I think he described the process as having a painted brick wall and nailing some metal lath onto it and putting the setting bed onto the metal lath. Now, you may not use that in your terminology, but I think you understand what I mean. Is this the work that the plasterers would claim as their work?

[168] Mr. Capuano: If the tile was not installed on the same day, yes.

Hearing Officer: In other words, if it were not wet?

Mr. Capuano: Right, if it were allowed to harden and he came back another day and put tile on that coat of mortar with this L.&M. that he is talking about, we would claim that coat of mortar.

Hearing Officer: All right. Now, is this setting bed, is this work that is claimed by the Tile Setters?

Miss Thacker: Yes.

Hearing Officer: O.K.

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Cross Examination

Q. (By Mr. Shepherd) Mr. Martini, you said this meeting was held in the office of the Plasterers Union on the 20th? And when did the pickets go up on this job? A. That was on the 17th.

Q. 17th. How long were the pickets up? A. Oh, they were gone by noon out there.

Mr. Longshore: Three hours.

A. After we pulled our men off the job they had nobody to picket.

Q. (By Mr. Shepherd) Well, I mean, your men stopped because of the pickets, because of the great number of other [169] union men that were employed in the plant. A. That's right, we pulled our men off because we didn't want to embarrass our client out there, Rainbo Bakery.

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[173] HENRY BERTOLINI

was called as a witness by and on behalf of the Tile Setters and, having been first duly sworn, was examined and testified as follows:

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[174] Direct Examination

Q. (By Miss Thacker) Mr. Bertolini, what company are you with? A. The Bertolini Brothers Company.

Q. Is that in Youngstown, Ohio? A. Yes.

Q. And what is your position? A. President.

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[175] A. Two brothers, two other brothers and myself.

Q. Are you active in the National Association? A. Yes, I am Vice President of the Tile Contractors Association of America.

Q. And have you held other positions there? A. Yes, I have been a Regional Director for about four years. This is my second year as Vice President. I also serve as technical committee chairman.

Q. Are you connected with C.S.I., that is— A. Yes, I am a professional member of Construction Specification Institute. I am also a member of the American Society for Testing Materials.

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[179] Q. (By Miss Thacker) Now, Mr. Bertolini, will you identify the National Agreement of the Setters and briefly what it covers. [180] A. Well, the National Agreement, T-2, is between the Tile Contractors Association of America and B.M. & P.I.U. of America. This agreement is between our association and the Bricklayers to set out what constitutes the work that belongs to the craft known as the Tile Setters. It sets out the agreement, the days that it was in session, what the Tile Layers' work is to be defined as, what the parties agree to as far as workmanship of, I am sorry, the quality of the workmanship.

It defines methods of apprenticeship. It defines what working hours will constitute shift time.

It defines the method of bargaining at the lower level. It defines methods of arriving at, not arriving at, I am sorry, of setting arbitrations between member signatures of this agreement.

Q. Does it recognize the National Joint Board? A. It does not.

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[181] Q. (By Miss Thacker) Mr. Bertolini, are Martini Tile and Terrazzo and Texas State Tile & Terrazzo members of the National Association? A. Yes.

Q. So they are bound by this National Agreement which you have in your hands? A They are bound by the National Agreement.

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[183] Q. (By Miss Thacker) Now, Mr. Bertolini, have you observed [184] the laying of tile over a period of years, have you seen the craft at work and you have observed it? A. Yes.

Q. Closely over a period of years? How long? A. Since 1939.

Q. Is this a daily observation or a weekly observation or what is the frequency? A. Beginning from 1939 it was daily. And as the years progressed and I became an officer in the company, it diminished to probably two or three times a week.

Q. Now, do you have occasion in your capacity now and from the time that you came into the company to observe the plasterers at work? A. Yes.

Q. About the same, with the same frequency? A. Yes.

Q. So that you feel that you would be acquainted with the work of both crafts? A. I would say yes.

Q. Are you familiar with the various methods of setting tile? A. I am.

Q. Would you describe to us the conventional method? A. The conventional method is generally accepted to be three coats of mortar installed over a metal lath back-up [185] which has been scratched and if necessary plumbed by the plasterers. Both scratch coat and plumb coat are to be scratched. The tile setter then installs his final setting bed onto which the tile are installed.

Q. Now, are you familiar with the 1917 agreement between O.P. and C.M.I.A. and B.M. & P.I.A.? A. I have read it.

Miss Thacker: May I offer this in evidence at this point, Mr. Hearing Officer?

Hearing Officer: It will be marked as T-4.

Miss Thacker: Please.

Hearing Officer: Would you mark this as T-4, please?

(The document above-referred to was marked Texas State's Exhibit No. 4 for identification.)

Q. (By Miss Thacker) Now, this was an agreement between the two unions? A. Correct.

Q. Do you know—

Mr. Capuano: What are you reading?

Miss Thacker: The 1917 agreement, page thirty-two.

Hearing Officer: Why don't we get him to identify this book first to have the record clear. What is this T-4 you have in your hand?

The Witness: T-4 is a plan for settling jurisdictional disputes nationally and locally, and it's approved by the Building and Construction Trades Department, AFL-CIO, [186] agreements and decisions rendered affecting the building industry by the AFL, the Building Trades Department, AFL-CIO, the National Board for Jurisdictional Awards.

Hearing Officer: O.K., that is enough. Are you familiar with this book?

The Witness: I am familiar with the parts that pertain to the B.M. & P.I.U.

Hearing Officer: You have occasion to utilize these parts of the book?

The Witness: Yes.

Hearing Officer: O.K.

You may go ahead, Miss Thacker.

Q. (By Miss Thacker) All right. Now, this agreement is specifically between the two unions, is that right? A. This particular one, yes.

Hearing Officer: What agreement are you talking about?

The Witness: I am talking about the agreement—oh, I am sorry.

Miss Thacker: It's on page thirty-two, Preparation of Walls and Ceilings to Receive Title.

Q. (By Miss Thacker) Do you know of any agreement between the two unions that has been made since this 1917 agreement? A. I believe one in 1924.

Q. That is over here on page 104. A. 104.

[187] Q. Now, this is where they reaffirmed it. Now, this applies to the conventional method that you have just described—

Mr. Capuano: I am going to object, now. If he is an expert witness let him testify. Miss Thacker insists upon putting in her own comments and in effect testifying.

Hearing Officer: Sustained. Please don't lead the witness.

Q. (By Miss Thacker) Now, this agreement of 1917, does this pertain to the method, or what method does it pertain to? A. This agreement pertains to the method, to the conventional mortar method, commonly called in the trade as the mud method, which says that the plasterers do have the right to plumb, rod and square all walls and scratch same so as to guarantee adhesion of the final coal which shall be put on by the tile layers to act as a bed for his tile.

It further states that the same is applicable to all ceilings, that again that it shall be leveled and rodded and properly scratched so as to guarantee adhesiveness of the final coat which is to be applied by the tile setter and act as a bed for his tile.

Q. Now, is there anything different shown in the February 21, 1924 decision on page 104? A. I believe that it just confirms it, or reaffirms it.

[188] Q. Reaffirms it. All right.

Now, that has to do with the conventional method. Now, would you describe for us, please, the one coat or float

coat method? A. The one coat method is an abbreviation of the conventional mortar method, was devised for almost a specific purpose, of installing tile in remodeling work over back-up that was already in place. Having a back-up there which could be either brick, block, sheetrock, plaster, plastic tile. As long as there was a back-up there you applied expanded metal lath to this back-up. And in one procedure you installed a final setting bed for the ceramic tile onto which was installed, or which is installed the ceramic tile. This entire procedure is known as the one coat method. Normally in a bathroom a tile setter will go in and do this whole procedure in a residential bathroom in one day.

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[193] Q. (By Miss Thacker) Now, Mr. Bertolini, would you describe to us the thin set method? A. The thin set method is a method of installing ceramic tile over back-up walls with a bond coat. This can be a so-called dry set mortar. It can be an organic adhesive. It can be a epoxy. It can be a polyester formulation. But generally it is in those four broad classifications.

You use this material to attach tile to a surface prepared by others.

Q. This bonding agent that you have just described, these various things that it may be, can that in any sense be referred to or called a setting bed? A. We do not call it the setting bed because it in no way can determine the method or the finished appearance of the tile. I mean, I am sorry, it does affect the finished appearance of the tile, but since it is not under the control of the tile setter we cannot call the back-up wall the setting bed, so the adhesive line, the glue line, as some people call it in a derogatory mood, is used to adhere the tile to the back-up wall.

Q. Now, is there any difference in the guarantee which you as a tile contractor can give on the conventional method, [194] the one cost, float coat method, and the thin

set method. A. In the conventional method the tile setter and the tile contractor install the tile setting bed, which controls the finish line of the tile. Therefore, he must assume the responsibility of the finished appearance of the tile wall. When the tile contractor and his tile setter install the one coat method he also controls the setting bed of the tile and therefore must assume responsibility. In the dry set method, or the thin bed setting method—

Hearing Officer: That is the same method?

The Witness: Yes. In the trade there's three, you can call it the dry set method, the thin set, some call it the thin bed.

Hearing Officer: It's all the same thing?

The Witness: It's all the same thing.

Hearing Officer: Go ahead.

A. It's the way that someone has got the words out. It probably more properly is the thin set method. Now, the thin set, since you are installing tile over walls prepared by others, over which the tile contractor or the tile setter have no control, the tile setters through their union and the tile contractor being the employer, cannot assume the finished, the responsibility of the finished work of the tile because with the thin line of adhesive or a thin line of dry set mortar, the tile must, within certain minute [195] corrections which are possible, must follow the wall that is there. And therefore he cannot assume the responsibility for the quality of the work.

Q. (By Miss Thacker) Now, then, insofar as the bonding agents are concerned, with the advent of the organic and inorganic, has it made a difference in the setting of tile, any material difference? A. Well, the advent of dry set mortar has allowed tile to be installed in many instances where ceramic tile was not use before because by using the thin set method it was very easy to install tile over masonry walls in either Haytite block or cement block without the use of any other preparatory methods. And therefore, the architect could achieve a finished wall resembling a conventional mortar method in appearance,

but the finished appearance was not always as nice as the conventional method, but because of the savings in cost he accepted that.

So a title contractor was able to figure walls where we weren't able to figure before.

Also in remodeling it was possible in the thin set method to install tile using an organic adhesive over finished gypsum plaster that maybe had been in for years before and the home owner had just decided he could afford the money to put tile in and the contractor applied tile with this organic adhesive over finished plaster.

[196] Let's see, continuing, the other advantage of the invention of dry set mortar has been to allow the contractor the option of when installing tile in the conventional mortar method, because of the temperature or because of job conditions, to allow him to float his final setting bed and not necessarily cover that final setting bed while the bed was still plastic or wet, but allowed him to come back the next day and install the tile and still be assured of a bond equal to or better than he would have had the day previous.

There are time because of temperature that the final setting bed starts receiving its initial set before the tile can be properly adhered with a neat cement bond or neat cement or bond coat. And therefore the tile contractor through his tile setter defers putting the tile up but prefers to wait until the next day and set the tile using, again, either dry set mortar or a neat portland cement coat.

If on metal lath, more often than not, metal studs, because of the flexibility of the metal lath and the fact that a tile setter must beat his tile into the wall, the vibrations which occur would defeat the bond between the final setting bed and the scratch coat or the plumb coat that has been previously applied, he defers again the setting of the tile until the next day when his setting bed has firmed up enough that he can then apply the tile without disturbing his lines.

197] And, of course, job conditions would be to allow a tile setter to put up his final setting bed in areas where there is other traffic, where there is incovenience, and therefore he puts up his setting bed one day, comes back at a later time, even in the evening, or the following morning, and puts his tile up.

In the use of ceilings, it is extremely difficult to install tile in a wet mortar, and has been generally the custom of the trade to float his tile setting bed one day, either late in the afternaan, and come back the next day and prior to the advent of dry set mortar, install his tile with a neat cement coat.

With the use of heavy tile, such a quarry tile, hand-made faience tile, which is a relatively thick, heavy body, laid in the wet method because of the weight of the tile, it is extremely difficult to put tile on a wet setting bed, and again if it was on a metal lath where he even had to beat it, there were two reasons for him to withhold it, and it has been the custom of the trade for many years when installing heavy faience tile wainscoting or quarry wainscating to float out the final setting bed for the tile and come back the next day and set the tile with a neat cement coat, not dry set mortar or adhesive, but use a neat cement coat.

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[203] Hearing Officer: Well, then you will stipulate that these are the specifications with Rainbo Bakery?

Mr. Capuano: If Miss Thacker tells me that is all there is, I will take her word and stipulate to it.

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[221] Q. (By Miss Thacker) Are you familiar, or rather do the apprentices learn to put on a float coat? A. Yes.

Q. What per cent of their time, of their total time, as apprentices is spent in learning to do this? A. The major portion. It would be probably difficult to say the percentage unless you include the procedures that lead

up to the installation of the float coat, which start with learning the proper mixes for the different type of installations, how these mixes are to be made, how they are applied to the wall with a hawk and a trowel, the preparation necessary to plumb, rod and square a wall, the use of float strips, as we call them, or lattice strips, screed strips, they are all three the same, the use of a level, the use of a square, the use of the hawk and trowel, all pertain to applying mortar to a wall.

This is a major portion of a tile setter's apprenticeship program because this is the part that—I can't think of the word—which rules the finished appearance of the wall.

Now, also, of course, the apprenticeship covers the [222] same thing in floors, so what percentage I couldn't really say, but maybe forty per cent of his time.

Q. How long does he generally spend in learning to apply the adhesives or the bonding agent? A. A comparatively relatively short time. The apprenticeship program covers about four years of time, and in this four years he learns all of these different trades, sometimes working at a different portion of it for three or four months. The thin-set method is learned about the last three months of his apprenticeship since it should be learned after he has learned how to plumb, rod and square a wall, because there are applications when this is required and he must apply the tile in a thin-set method over these walls, but a majority of the time these are applied over other surfaces, and therefore the skill is much less.

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[224] Q. (By Miss Thacker) Now, in the 1917 agreement it says that the plasterers are to scratch, plumb, rod and square so as to guarantee adhesion of the final coat. Why is this necessary, Mr. Bertolini? A. For the reason mentioned, that unless the plumb coat is scratched you cannot guarantee the adhesion of the final setting bed.

Q. What would happen? A. You would not achieve proper bond and you—it is possible to get a delamina-

iton or what is a separation of the final setting bed and the plumb coat, and therefore you would have a faulty installation.

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[225] Q. Now, does the March '67 clarification of the Joint Board specify that the plasterers are to scratch the final coat— A. No.

Q. —that they apply? A. No.

Q. If this final coat that the plasterers apply is not scratched can the tile setters proceed with their float coat? A. They can, although it is not in the best interests of the job to proceed because you are not guaranteeing adhesion by keying in with the plumb coat. The tile, the final setting bed of the tile setter can adhere to a plumb coat that is not scratched, but to insure that it is going to key in and bond properly, it has always been the requirement that the plumb coat be scratched.

Q. Now, if this coat, the final coat, that the plasterers apply is scratched, can there be a thin set? A. No, because of the surface of the scratched surface, [226] the surface of the scratch is so irregular and rough and gritty that applying an organic adhesive would be futile. An epoxy would be the same. A dry-set mortar could possibly be done if you were to again treat the wall, but again the grittiness and the rough texture would preclude a proper finished appearance to the tile wall.

Q. Can you account for any reason that the term scratch is suddenly eliminated in this clarification when it is in the agreement between the two unions?

Mr. Capuano: Well, now—

A. I cannot.

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[227] Q. (By Miss Thacker) All right. The initial agreement between the two unions, the 1917 agreement, says that the final coat applied by the plasterers is scratched. [228] A. Correct.

Q. Now, in the clarification, March '67 clarification by the Joint Board, this is not an agreement between the two unions but a clarification, but it refers to the 1917 agreement, and the term scratch is deleted as to their final coat.

Now, I am saying with the deletion of this word scratch is it feasible from a construction standpoint for a tile setter, then, to apply his float coat if it's a conventional method—A. No.

Q. —or the thin-set? A. If it's a conventional method, no. If it would be the thin-set bed, yes.

Q. All right.

Then there would be, if it were thin-set, then who would be putting on the setting bed? A. The plasterers.

Q. And why? A. Because they are installing a back-up wall with a finished surface over which a one-eighth inch or maybe even as thin as one-sixteenth of an inch bond coat of dry-set, organic adhesive, can be applied.

Q. Now, according to the 1917 agreement, where it says that the plasterers shall plumb, rod and square, is this a [229] final or a preliminary plumb, rod and square? A. This has never been the final setting bed. The plumbing and rodding and squaring of the wall prior to receiving the final setting bed has been the work of the plasterer, but it has been scratched in order to guarantee the adhesion of the final setting bed. This is not the coat on which the tile are bonded.

Q. All right.

Now, in the March '67 clarification, we have a clause which says that if it's set during the same work day in which this is, and this is in quotes, "set during the same work day in which such coat is applied the plaster materials shall be applied by tile setters in the interest of efficient job operation."

Now, let's look at this particular terminology, Mr. Bertolini. Is it always feasible for a tile contractor to set tile the same day it's floated, the wall is floated? A.

There was never any ruling, there was never any mention in the agreement—

Mr. Capuano: Now, I am going to object. She asked him a simple question, is it feasible to do this. Now, we are getting what is in the agreement.

Hearing Officer: Try to be responsive to the question. Did you understand the question that she asked? She wants to know about feasibility.

[230] Mr. Capuano: The feasibility of setting tile the same day while the mortar coat was wet, is it feasible?

The Witness: Oh, yes.

Mr. Capuano: That is all that was involved.

Hearing Officer: O.K. Go ahead.

Q. (By Miss Thacker) Is it always feasible? That was my question. A. No.

Q. Why? A. Because of job conditions, because of time of the year which involves temperature, winter, summer, heat and cold, type of tile to be installed, and the area to which the tile are to be installed, would govern whether the tile could be properly adhered to the final setting bed on the same day.

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Q. Generally does a tile contractor like to float out his entire work—

Hearing Officer: I am going to—

Q. (By Miss Thacker) —first from the standpoint of job efficiency?

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[231] A. Yes.

Q. (By Miss Thacker) Why? A. Because he can minimize the amount of operations that a tile setter must do in one day. Rather than go through the entire procedure of floating, bonding and installing tile and cleaning down the tile wall, he would, in order to expedite and cut the cost of the finished product, install his tile setting bed in a large area continuously throughout [232] the day with the express intent of coming back

the following day and covering that area with ceramic tile.

Q. Now, you as a tile contractor who has been in business many years, would you be willing to submit to some rule or regulation which told you when you were to set your tile? A. No.

Q. Do you feel that that is your prerogative as to when you set it, whether you set it today or next month? A. Yes.

Miss Thacker: I believe that is all, Mr. Hearing Officer. Oh, wait just a minute.

Two more questions, Mr. Hearing Officer, please.

Hearing Officer: Go ahead.

Q. (By Miss Thacker) When the tile setter installs his float coat does he at that time establish the finished dimensions? A. That is one of the criteria.

Q. At the time when the plasterer puts on his final coat are these finished and completed dimensions the same? A. No.

Q. His is preliminary, then, I mean, the plasterer? A. Being a—may I elaborate?

Hearing Officer: Sure, go ahead. I think it calls for it. [233] A. Being that the plasterer is installing the plumb coat only, he would have no way of knowing what the final dimension requirements are, what dimensions must be met by the finished tile, since the setting bed regulates not only the final dimension but the appearance of the tile, the plumbness, trueness of line, cofrectness of pattern.

Q. (By Miss Thacker) Now, as an employer, as a tile contractor, do you have a preference as to work assignment to any one craft? A. Yes.

Q. Which one? A. We have, as an employer, assigned the scratching of the lath and the plumbing and rodding and scratching of the plumb coat to the plasterers and we have assigned the installation of the final setting bed and the bond coat and the tile to the tile setters.

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[234] Cross Examination

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[254] Q. O.K.

Now, would you get—do you have a copy of the green book there, T-4?

Would you look at page thirty-two, please? A. I am.

Q. I believe you testified on direct that the 1917 agreement pertains to the conventional method, is that right, of setting tile? A. Yes.

Q. Now, could you tell me if any place in that 1917 agreement it refers to the words conventional method of setting tile? A. It does not.

Q. How about the agreement listed on page thirty-three, [255] the agreement between the Interstate Mantel and Tile Contractors Association and the two unions, does that use the words conventional method any place? A. I have not read it but—

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A. It does not specifically refer to the conventional mortar method.

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[257] Q. All right.

Look on page 104 of T-4, would you, please? A. Yes, I looking at that.

Q. See the decision of February 21, 1924. Are the words conventional method of setting tile used in that decision? A. They are not.

Q. Now, do you as a tile contractor recognize this 1917 decision and 1924 decision? A. We generally have.

Q. You abide by it? A. Yes, we do.

Q. You assign your work when you are doing it—A. Yes.

Q. —like that, right? A. Yes.

Q. Do you know approximately when dry-set mortars came into being? A. Early '50s.

Q. Pardon me? A. In the early 1950's.

Q. Would it refresh your recollection if I said [258] approximately fifty-five or fifty-six? A. No more than that I just said because I am not positive as to the time because it was developed actually in this area and migrated throughout the country, and I can't say just when it really became a known product, such as dry-set mortar.

Q. O.K.

Now, going back to this T-4, what is the first thing that the agreement says must be done to the wall?

Hearing Officer: Are you talking about the 1924 agreement?

Mr. Capuano: No, I am talking about the 1917 agreement, page thirty-two of T-4. A. Well, it says here that, "First, it is agreed—"

Q. (By Mr. Capuano) No, I don't want you to read the whole thing. I just want you to tell me the first thing that must be done to the wall under the agreement, starting from the rough— A. "Shall prepare or plaster the walls."

Q. All right. And what would that include? A. It would include the plumbing, the rodding, the squaring and the scratching of same.

Q. All right. And then the tile setter would come and he would have certain things to do in this agreement or under this agreement, right? [259] A. Yes, it says here he would put on the final coat.

Q. It means he would put on the final setting bed, is that right? A. Yes, sir.

Q. And then the next thing would be the setting of his tile, right? A. Onto the setting bed.

Q. Yes, onto the setting bed. A. Right.

Q. So we have got four of five tasks outlined there, right, setting the wall, plumbing, rodding, squaring. A. Yes, some of those tasks are actually done simultaneously.

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[260] Q. Let's take a situation where the specifications provide on a job that you have got a concrete block wall, and the plasterers, or let's leave out the plasterers, let's just say a coat of mortar is to be put over those walls to plumb them, level them, square the room, and tile will be set with dry-set mortar. Follow me? A. I do.

[261] Q. In that situation isn't the wall being plumbed, the room being squared, the tile being set? A. If the work is done by the tile setter, yes.

Q. You are not answering my question. I didn't use any craft names. I simply said doesn't the room have to be plumbed, the wall, I mean the wall plumbed, leveled, the room squared, and the tile set? A. Well, when you say "have", you see, if you said "should"—

Q. Don't try to— A. I am sorry, but when you say "have to be," it probably should be, but whether it has to be is something else.

Q. The specifications provided that. So according to the specifications these things have to be done, don't they? A. All right. Yes.

Q. O.K.

So now we have got certain tasks that have to be performed, don't we? A. Yes. All right.

Q. Certain functions that have to be performed, regardless of who does them, they have to be done, don't they? A. To get the tile on the wall, yes.

Q. Right.

And the 1917 agreement provides certain functions that have to be done, doesn't it? A. Yes.

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[263] Q. (By Mr. Capuano) O.K. Let's take the American Standards Association. Do they recommend installing tile in the conventional method on a dry bed? A. Conventional method on a dry bed.

Q. Yes. A. No.

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[264] Did I understand you to say yesterday that in installing ceilings you put, again we will stick with ceramic tile, glazed ceramic tile, that you install those on a dry bed? A. Yes.

Q. Is that a recommended procedure by the American Standards Association? A. No.

Q. Do you know who the American Standards Association is? A. Yes.

Q. Who is it, or what is it? A. It is a group that are responsible by procuring from related people and trades who set up a method or a specification for the installation of that product.

Q. The recommended specifications for the industry, aren't they? They are the standards for the industry? A. They are a standard.

Q. For the industry? A. Yes, they are a standard.

[265] Q. As a matter of fact, they make specifications for the installation of tile in Portland cement mortars. A. They do.

Q. And personnel on the committee preparing the specifications include representatives of your group, don't they? A. Oh, yes.

Q. And it includes representatives of the Bricklayers, doesn't it? A. It does.

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[267] Q. Do you know whether in P-7 there are any provisions for installing of quarry tile or whether—let me cross that. Do you know whether P-7 recommends the installation of quarry tile on a dry bed?

Let me ask you this first— A. Do I know? Yes, I do know.

Q. You do know. Does it recommend setting quarry tile— A. No.

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[271] Q. (By Mr. Capuano) All right. I show you what has been marked as Plasterers' Exhibit No. 8 and ask you if you can identify that. A. Yes, I can.

Q. Would you tell us what it is? A. It's commonly known as A 118.1, American Standard Specifications for the installation of ceramic tile with dry-set Portland cement mortar.

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[272] Q. Did you read it? (c).

Does it refer to the dry-set mortar as the mortar setting bed? A. It refers to it as a mortar bed.

Q. I am sorry, mortar bed, yes, you are right.

And that is talking about the dry-set mortar which is going to be used to install the tile, isn't it? A. It is.

Q. Now, let's go over to page ten, Section 5-4.1. See that, Application of Mortar? A. (a), did you say?

Q. Yes. Well, that is what I want you to look at. A. "Mortar bed to be minimum of one-sixteenth inch.'"

Q. What mortar bed are they talking about? What is that mortar bed composed of? A. Of dry-set mortar.

Q. Dry-set mortar. And you are going to put your tile right on, there, is that right? A. Oh, yes.

Q. And there will be dry tile used? A. Yes.

Q. You can use a dry wall to put it on, correct? A. You can.

Q. How about over on page twelve? They are talking about floors there, I believe. I don't want to mislead you. [273] Do you see it? A. Thank you.

Q. See Section 5-5.1(b)? A. Mortar bed.

Q. Mortar bed. And they are talking about the dry-set mortar again, aren't they? A. They are.

Q. Now, if you look, if you go back to page three, you see a Section E-2? A. I do.

Q. Requirements of Related Trades.

Would you read (a) for us, please? To yourself. A. I have read it.

Q. It provides that certain work will be included in other specifications or for other trades, doesn't it, and that it includes those specifications in Appendix A in the back of the book, correct? A. It doesn't necessarily say other specifications.

Q. Well, all right, it says— A. It says of the appropriate section of the specifications.

Q. All right, for other trades? A. Not necessarily.

Q. All right. Why don't you turn to Appendix A and see what that is entitled. That is on page thirteen. What is that entitled at the top? [274] A. Related Trades.

Q. No, read the whole title. A. Oh, I am sorry. Requirements to be included in Related Trades.

Q. All right.

And do you see Section A-3 on page thirteen? What is the title of that? A. Lathing and Plastering Trades.

Q. And read it over to yourself, will you, please, quickly? A. I have read it.

Q. Down to about (d). Did you read that? A. All right.

Q. That provides, doesn't it, that when you are going to have a mortar back-up to tile for the installation of tile installed with dry-set mortars that the scratch coat or brown coat installed by the plasterers, doesnt' it? A. It does.

Q. And it provides for the brown coat of the plasterers to be plumb and square, doesn't it, plumb with square corners, in Section (c), Sub-Section (c)? A. Correct.

Q. Referring you again to P-8; who will, what craft will put on the mortar bed referred to on page five that you talked about? And it's also on page eight, page ten. A. The mortar bed will be put on by the tile setter installing [275] the tile.

Q. O.K. Now, getting back to your original statement. A. Which one?

Q. I am going to tell it to you. I was just looking for it in my notes. A. O.K.

Q. That the dry-set mortars are not called setting beds when the back-up is prepared by another craft. Do you recall that? A. I think I do.

Q. All right.

You disagree, then, with the American Standard Specifications, don't you? A. In a way I kind of agree with

them because they say it's just a mortar bed. They don't call it the final setting bed.

Q. All right, call it a mortar bed. You just told me that is what the tile is going to be installed in, isn't it? A. It is going to be installed into this, as you call it, the mortar bed. Wo do not call it such.

Q. The American Standard Specifications refer to it as the mortar bed? A. Correct.

Q. Doesn't it? A. Yes, it does.

Q. And the American Standard Specifications, P-7 and 8, [276] don't differentiate in the terminology of that bed regarding which craft puts on the back-up for it, does it? A. It does not.

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[280] Q. (By Mr. Capuano) Mr. Witness, we were talking before the break about a crooked door buck. Do you recall that? A. Yes, I do.

Q. You have had time to think about it now. A. Yes.

Q. Where your tile, you may have only half a tile at the bottom of the door frame, but because the door frame is crooked you have got three-quarters of a title at the top. Do you recall the situation? A. Yes, very definitely.

Q. The door frame would not look good, would it? A. It would not.

Q. Your tile would look crooked where it butted up against the door frame, wouldn't it? A. The cut would be out of plumb.

Q. You could see it, too, couldn't you, the difference between the half and the three-quarters? A. Yes.

Q. Your tile setters don't claim the installation of the door buck, do they? A. They do not.

Q. Now, you have installed tile wainscoting, haven't you? [281] A. Yes.

Q. And where above the tile is going to go some other material, for example, plaster. A. Yes.

Q. What other materials could go above the wainscoting? Marble? Would you have marble above it? A. Not generally.

Q. Not generally. All right. What are some other materials? A. Cement block.

Q. Cement block. All right. Let's stick with the plaster. You have got a situation where you have got tile wainscoting, plaster above it. You would generally have a casing bead between the tile and the plaster above it, wouldn't you? A. No.

Q. You say you would not? A. No, not generally.

Q. Not generally. All right. You have had casing beads separating the tile from the plaster, haven't you? A. We have.

Q. If the casing bead is crooked and the plaster runs down to the casing bead and your tile runs up to the casing bead, you are going to have small cut tiles on one end, larger tiles on the other other end, aren't you? A. This casing bead, now, runs horizontally?

Q. Horizontally, yes, that's right, horizontally. [282] A. And we are going to have cuts where, Mr. Capuano?

Q. Well, at one end of the casing bead that is lower than the other end you may have a full tile at the low end and at the higher end you will have to have pieces of tile. A. Why?

Q. If the casing bead is running at an angle, not straight, horizontally. A. You are presupposing something that I don't assume, and that is that we would cover the casing bead.

Q. I am not telling you you are covering it. I am saying you are going to run up to it. A. Oh, I am sorry. In other words, you are going to install the ceramic tile flush with the finished wall of the plaster.

Q. Yes, and you are running up to the casing bead and the casing bead is not, say, level. It goes on an angle instead of being level in a horizontal plane. A. Well, if tile had to be installed in that instance the cut on the top of the tile would be out of level.

Q. You could see it, couldn't you, if it was out of level enough? A. Yes, you would.

Q. Who installs the casing beads generally, what craft? A. If it's a metal casing bead I would assume it's the lather.

Q. Do you know if the tile setters claim the installation [283] of the casing bead where they are running tile up to it? A. No.

Q. No, they don't? A. They do not claim it.

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[284] Q. (By Mr. Capuano) Now, if I understand your testimony correctly, you as a tile contractor would guarantee the tile installation if you installed the back-up when dry-set mortars were to be used to set the tile, is that correct? A. We would.

Q. Now, when you are putting tile with dry-set mortar directly onto a concrete block wall, do you or do the tile setters claim the installation of the concrete block wall? A. We do not.

Q. Now, do you know if any other crafts, any other contractors on jobs, have to guarantee the installation of their work? I am talking about generally. [285] A. I would presume that they have some form of guarantee. Whether it's identical to ours I can't say.

Q. And would you say as a contractor that has been in business a long time that generally owners and architects require every sub-contractor, as well as general contractor, to guarantee the work he installs for a period of a year, one year? A. Yes.

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[287] Q. (By Mr. Capuano) Now, Mr. Witness, did I understand you to say yesterday that if a tile contractor installed the brown coat of mortar either on metal lath over the scratch coat or as the first coat on concrete block, for example, as was done in the bathrooms at the Anderson Library, then he came back the next day or two days or a week later, and installed the [288] tile with a dry-set mortar, did I understand you to say that that brown coat of mortar would be the setting bed? A. Yes.

Q. Even though the coat is dry, correct? A. Yes.

Q. Now, do the American Standard Specifications call the brown coat the mortar bed in the example I just gave you? Do you know? A. Does the American Standards Associattion call for the mortar—

Q. Do the American Standard Specifications— A. Which one, now?

Q. P-7. A. Oh, P-7. All right.

Q. No, I am sorry, P-8, the dry-set mortar, do they refer to the brown coat in the example I just gave you as a mortar bed or as a mortar setting bed, as you call it? You may look at it if you want. A. I couldn't answer that without an explanation.

Q. Pardon me? A. I couldn't answer that without an explanation.

Q. You couldn't answer that question without an explanation? A. Yes. I would have to see how the job is specifically specified.

Q. I will tell you. The specification call, you have got a [289] concrete block, the specifications call for a plumb coat of mortar, Portland cement mortar. A. Yes.

Q. Over that concrete block. A. Right.

Q. Then the tile is to be set with a dry-set mortor, L. & M., for example. You are familiar with L. & M.? A. The specifications specifically state dry-set mortar?

Q. Yes, dry-set mortar. And the tile contractor comes back after the coat of mortar is dry, the next day, a week, two weeks, puts his tile on the wall with the dry-set mortar. In that situation you indicated that the mortar coat or the brown coat was a setting bed, correct? A. If it's installed by the tile setter, yes.

Q. If it's installed by the tile setter, you say. It's not the setting bed if it's installed by the plasterers, right? A. Correct.

Q. Now, the American Standard Specifications make no distinction between who installs the brown coat behind the tile installed with dry-set mortar, correct? A. Correct.

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Q. That is all right. Now, let me ask you another [290] hypothetical question.

Let's take an example where the specifications provide that tile is to be installed in the conventional method, over wire lath, and the plastering— A. Over wire lath?

Q. Over wire lath. And in the plastering specifications it provides for a scratch coat, a brown coat, and the tile specifications it provides for a mortar setting bed. Set your tile in the conventional method. In that situation you would float your mortar setting bed on top of the plumb coat or brown coat of the plaster and you would install your tile right in that, correct? A. Yes.

Q. All right.

Now, supposing after the plasterer finishes putting on his brown coat, he has got a scratch coat on, he has put his brown coat on, now, under the American Standard Specifications for installation of tile and Portland cement mortars, P-7, it provides that the wall must be plumb, level, up to a tolerance of one-quarter of an inch in eight feet, correct? A. Yes.

Q. It does, O.K.

So after the plasterer puts his plumb coat on the wall, now, it's supposed to be the conventional method, you will recall, the tile setter is going to put the setting bed on, [291] the owner or the general contractor, the architect, decides that he wants this done faster or for any number of reasons, and he tells you, the tile contractor, don't bother putting on that mortar coat, put this wall up, install your tile with some dry-set mortar, Tec, L. & M. You go ahead and do that, right? A. We can.

Q. All right. When you do that what coat has been deleted? A. The final setting bed.

Q. Thank you.

Would you get T-6, please? I believe that is the ceramic tile specifications. A. I have them.

Q. Would you look at 15-4 of T-6? That is on page one, 1-1. A. Oh, I am sorry, I was looking at page 15-4. 15-4.

Q. You can read it to yourself. (a). There is only (a) there. A. I have read it.

Q. That is a standard type clause, isn't it, in specifications? A. Yes.

Q. And generally, so the record is clear, provides that you are supposed to inspect any work over which you are installing your work to make sure that it's O.K., and if it isn't proper [292] you are supposed to report it to the architect, right? A. Correct.

Q. In other words, if another contractor did something which you can't put your work over— A. Correct.

Q. —he will have to correct it, right? A. Yes.

Q. And if you go ahead and do your work you are accepting the prior work, correct? A. Yes.

Q. All right.

Now, look at 15-5, particularly (c). It describes a setting bed. Do you see that? A. Yes, I see it.

Q. Now, perhaps it would be better if you read right down to 15-7, not including 15-7, but I am referring to the sections entitled Materials and Laying Tile. I would like to ask you some questions about that. A. Down to 15-7.

Q. Right. A. I have read it.

Q. O.K.

Now, in your opinion what method, which of the three methods you described to us, is the architect requesting that the tile be installed through these specifications on [293] the Anderson job? Or if none of the three methods tell us. A. Well, it isn't specific enough to really define whether it could be the conventional mortar method or whether it might be the thin-set method because of (c) under 15-5 it says, "The setting bed shall be one part Portland cement and three parts sand, with two pounds of Stearox 100," which I am sorry to say I am not familiar with, "added to each sack of cement."

If this was not installed, and I don't know what purpose it serves this would normally be considered a pretty rich mix to use for the final setting bed, but as I

have said before, I have not seen the job, I don't know how it's installed, and I am not sure, but I would, based on that assumption, I will say that this is a conventional mortar method.

Q. Conventional mortar method. O.K.

So that would mean that the tile should be soaked. A. Would be.

Q. And it would be set in that mixture of what the architect calls the setting bed, consisting of one part Portland cement and three parts sand, right? A. If I may digress, the tile should be soaked if they are set the same day.

Q. Well, in the conventional method don't you set it the same day? A. Not necessarily.

[294] Q. Well, I guess we will go back, then.

Didn't we discuss this before about recommended methods of setting tile in the conventional method? A. I think you were talking about recommended by A.S.A., and I am talking about the way it is normally put in.

Q. All right. A. Because tile are installed under other specifications than A.S.A.

Q. All right.

Now, are you telling me that in the conventional method of setting tile the normal procedure is not to set the tile the same day that you put on your mortar setting bed? A. It can be.

Q. Now, listen to my question again. I believe you heard it.

The normal method, isn't the normal method in the conventional way to set your tile the same day you install the mortar setting bed? A. No.

Q. That is not the normal way? A. No, as of today, no.

Q. As of how long ago was it? A. Sometime after the advent and the use throughout the tile industry of dry-set mortar has it been accepted that the conventional mortar method allows you the option of allowing the final setting bed to harden and the tile can then [295] be ap-

plied with a bond coat of dry-set mortar. Now, this has been accepted and there are specifications, not A.S.A., I will grant you, but there are others who specify it that way, and they call it the Portland cement—I mean, I am sorry, the conventional mortar method, allowing the contractor that option.

Q. So you are using dry-set mortars in the example you are giving me in answer to my question about the conventional method. A. They are using dry-set mortar as a bonding agent, that's right.

Q. O.K.

Well, now, we will specify some more details for you so you don't have to get into the dry-set mortar. We are talking about the conventional method of installing tile as set forth in P-7, American Standard Specifications for Portland cement mortars. Are you with me? A. Yes, sir.

Q. We are talking about using dry-set mortars. We are talking about the conventional method set forth in P-7. A. Oh. All right. As set forth in P-7.

Q. Yes.

Q. Now, installing it in a conventional method, as I just described, the tile would be installed in the mortar setting bed the same day, wouldn't it? [296] A. As set forth in that, yes.

Q. Now, if this job were the conventional method, as I just described to you, the tile should be installed the same day that the mortar setting bed is installed, correct? A. I see no reference in this specification to A.S.A. specifications.

Q. Did you hear me put that in my question? A. That is why I can't answer you.

Q. All right. A. Because in your—

Q. I will try to make it so you can answer.

Would you please take a look at page 15-2, Section 15-6, Laying Tile, Section (a), and see if that is going to help you to answer my question?

Hearing Officer: What are you looking at?

Mr. Capuano: I am sorry, T-6. Those are the specifications for the installation of tile. A. It states there only as large an area as can be covered with tile before the mortar has reached its initial set shall be placed in one operation.

Q. (By Mr. Capuano) And you as a contractor would interpret, wouldn't you, the mortar they are referring to there is the mortar setting bed referred to back on page 15-1? A. Yes.

Q. So to get back to my question again, assuming, as you did, [297] that the architect is specifying the conventional method on the Anderson Library, the tile should have been set the same day that the mortar setting bed was installed, correct? A. According to these specs., yes.

Q. Thank you.

Did I understand you to say in your direct testimony that quarry tiles could not be set in a bed of mortar that was plastic? A. I didn't say they could not.

Q. Oh, you did not say they could not. A. I don't believe I said that.

Q. I am sorry, I wasn't sure what you said. A. Well, I mean, when you are telling me what I said it's hard for me to remember what I said.

Q. That's right, I understand that.

Well, in any event, you do know, don't you, that the American Standard Specifications, P-7, which you have in front of you, provides that when you are installing quarry tile, I am looking on page 20— A. That is all right, I am familiar with it.

Q. —that you should "float the mortar setting bed over areas no greater than may be covered with tile while the setting bed remains plastic." A. That's correct.

Q. You disagree with them again? [298] A. No, I don't say I disagree with them.

Q. O.K. You just say it could be done, is that what you are saying? A. I think I said before that it could be installed on a dry bed.

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[313] Q. I don't mind—O.K.

Now, when you say a wall is plumb, what do you mean by that? A. That it has a true surface so that when you put a level on it that it does not vary from a plumb line, which could be achieved by using a plumb bob and a string, it does not vary from that true surface.

Q. O.K. A. That is considered to be plumb.

Q. I agree with you. A. O.K. At least we agree on something.

Q. And what do you mean when you say that the wall is to be square? A. Two adjoining surfaces, two adjoining vertical surfaces, [314] must be in ninety degrees when measured with a square or with whatever you would call the instrument that a surveyor would use.

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[318] Q. (By Mr. Capuano) Now, when you do work now in new construction, new commercial construction, I am not talking about small buildings, I am talking about a good size project, like some of the buildings we see going up around here in Houston, are the buildings usually heated by the time you get in there, either temporarily or permanent heat operating? A. When conditions require it, yes.

Q. Many times the specifications require that there be heat in the building when you start doing your work don't they? A. If the outside temperature falls below a certain requirement, yes.

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[322] Q. No, no, I am asking you a particular example. I want you to take this particular case, a college dormitory where you had a bathtub, and you installed tile around it and around the bathroom part of it. Now, where did you put Portland cement in that bathroom? Did you put it around the tub? A. We installed Portland cement at a wainscot level around the room and to a six-foot level around the tub.

Q. All right.

Now, wainscot would be what, three to four feet? A. Probably four foot six.

Q. Four foot six. And six foot around the tub. Did that reach the ceiling? A. No, it does not.

Q. All right.

What was above the six foot and the four foot? A. It was installed later and it was a gypsum plaster.

Q. Gypsum plaster. All right.

So you had six foot over the tub, you had tile, correct? A. Correct.

Q. And you had Portland cement behind the tile? A. Yes.

Q. Did you have a coat of Portland cement or two coats on metal lath or something? [323] A. This was the conventional method and we installed the setting bed.

Q. O.K.

Then you had gypsum plaster above it? A. Yes.

Q. Did the plasterers put the brown coat below your setting bed? A. They scratched the metal lath.

Q. You put the— A. We did the plumb coat and the final setting bed.

Q. O.K.

And the plasterers up above your tile, around the tub, and around the wainscoting, put on a brown coat of plaster and then they put the white finish coat on, didn't they? A. Yes, they used the brown gypsum plaster rough coat, hair plaster, and then a gypsum white coat over the face of it.

Q. And they met your tile with their plaster? A. Yes.

Q. All right.

Now, would that be a common type job? A. I think so.

Q. O.K.

So in effect in that bedroom your tile setters didn't claim that gypsum, did they, above your tile? A. Never have.

[324] Q. So in effect you had two crafts putting on brown coats in the bathroom, one craft putting on a gypsum brown coat and another craft putting on a Portland cement brown coat? A. Portland cement float coat.

Q. I don't care what you call it. A. Plumb coat.

Q. One craft was putting on Portland cement and the other craft was putting on gypsum brown coat, weren't they? A. Well, unless the "were" is going to mean simultaneously, no.

Q. No, they weren't simultaneously. A. O.K.

Q. They had two crafts in there? A. Correct, two crafts would do the two types of work.

Q. You say this was a conventional job, too. A. Yes.

Q. So actually the plumb coat that your tile setters put on under the 1917 agreement, who would normally do that? A. Under the 1917 agreement it would have been the plasterers.

Q. So if they had done it they would have put on a gypsum brown coat and a Portland cement brown coat while they were in the bath, couldn't they? A. They could have, but they didn't.

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[326] Q. (By Mr. Capuano) Now, you say when a tile setter applies a float coat he can do it to finished dimensions, final dimensions, but you said when a plasterer puts on his final coat he doesn't know what the finished dimensions are going to be or his coat won't finish to the proper dimensions. Do you recall that? A. Yes.

Q. Now, I would like you to take a look at P-8, American Standard Specifications for installation of tile with dry-set mortars.

Look at page 13, Appendix A. A. I have 13.

Q. All right.

Look at Sub-Section A-3.1, Sub-Paragraph (e). See that? "Where tile to finish flush with plaster, apply brown coat behind tile of correct thickness to allow for tile and setting bed, so that tile and plaster finish will be flush."

Do you see that? A. Yes, I read it.

Q. Doesn't that say that the plasterer must put on his coat of mortar taking into consideration the finished line of the tile and to leave enough room for the tile contractor to put on the tile and the mortar bed, setting bed? [327] A. It so states, but that doesn't make it a fact.

Q. We are reading from the American Standard Specifications, aren't we? A. Yes.

Q. O.K. A. It says only that it will finish flush. That is only one dimension.

Q. To allow for tile and setting bed. A. Yes, to finish flush.

Q. So he has to know where the tile, what the finished dimensions of the room are going to be, doesn't he? A. The finished dimensions of the room? He may know the finished dimensions of the room.

Q. Wouldn't a plasterer putting on a coat of mortar on a wall, for example, that wall right there (indicating) where there is a door buck in it, he would have to know that your tile is only going to come, or your tile will finish a quarter of an inch recess from the door buck when he is putting on his plaster or mortar so that he doesn't put on two inches of mortar and bring you out an inch beyond the door buck, wouldn't he? A. You are asking—he should know that, and I agree, he should know that.

Q. That's right. All right. A. Yes, he should.

[328] Q. Look at P-7. That is American Standard Specifications for Portland cement mortars, tile installation. Look on page 27. A. I have it.

Q. Requirements to be included in Related Divisions, under Lathing and Plastering Division. Look at paragraph A-4.6. A. Yes.

Q. Doesn't that also provide that the plasterer should put on his leveling coat? A. Provides that it be scratched.

Q. Apply a level coat over scratch coat when necessary to meet requirements of A-4.5e or when a mortar

thickness of more than three-quarters inch is required to build out to finish tile surface. Scratch and cure leveling coat. A. Right.

Q. That is also providing that he has to know where the finished tile surface is going to go, doesn't it? A. Yes, there is a provision. There is a provision.

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[331] Q. (By Miss Thacker) All right. Now, then, Mr. Bertolini, would you look on page 104 as to the decision rendered February 21, 1924? [332] A. I have it.

Q. And the second paragraph there, would you read that to the comma. A. The second paragraph or the first paragraph?

Q. The second paragraph, starting "Plasterers." A. "Plasterers shall prepare or plaster walls and ceilings which are to receive tile."

Q. Now, would it be your interpretation that that would incorporate by reference, then, the August 22, 1917 agreement? A. Yes.

Q. That it would be adopting by incorporation everything that went into the original agreement, August 22 of 1917? A. I so believe.

Q. All right.

Now, then, let's go back to the 1917 agreement. In the first paragraph, but it begins with the word Second, then it says "All ceilings must be leveled and rodded and properly scratched." What does properly scratched mean to you? A. Scratched to a sufficient depth to guarantee the adhesiveness of the final coat. In other words, that would mean that although you might be able to scratch a level coat to many degrees, to be sure that you do get a good bond it must be firmly scratched, which would mean indentations of one-eight to three-sixteenths of an inch deep.

Q. Now, then, we have already firmly established, then, [333] the incorporation of this initial agreement into the 1918 agreement and in the decision on February 21, 1924, is that correct, from your interpretation? A. I think the decision rendered in '24 specifically says so.

Q. So that then the scratching, properly scratched, which was the initial agreement between the two unions, then, is incorporated by reference into these two subsequent or the one subsequent agreement and the first decision. A. Yes.

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Q. (By Miss Thacker) Then it says "the final coat which shall be put on by the tile layer to act as a bed for his tile."

And then we have in the next paragraph that begins Second, we have also, "the final coat which shall be applied by the tile setter and act as a bed for his tile."

Now, does this agreement, the terms of this agreement, tell us what the setting bed is to be made of? A. In 1917 ceramic tile was almost universally installed in a bed of Portland cement.

[334] Q. But does the agreement tell us or does the agreement specify what the setting bed is to be made of? A. Not specifically.

Q. Does the agreement tell us anything of the thickness of the setting bed? A. It does not.

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[341] Q. In connection with the American Standard Specifications, are they widely accepted or uniformly accepted? A. I would say yes.

Q. Are they uniformly accepted? A. No.

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A. It is not uniformly accepted.

Q. (By Miss Thacker) It is not uniformly accepted.

Now, how many methods of tile setting were known in 1917? [342] A. Basically one.

Q. What is that method? A. The conventional mortar method.

Q. Then would you assume that it was the conventional method to which the 1917 agreement was referring?

Mr. Capuano: I am going to object. What good is his

assumption of something unless it's based upon some facts of some expertise knowledge?

Hearing Officer: Well, I think you will have a chance on cross to delve into this, if you wish, but I am going to permit him to answer.

Mr. Capuano: O.K.

A. There being no other method of installation, you must assume that it refers to the conventional mortar method.

Q. (By Miss Thacker) Do you know of any agreements subsequent to this 1917 agreement, and then the 1918 agreement, which does not have the day or the month entered in the green book, by and between the two unions, the B.M. & P.I.U., and the O.P. & C.M.I.A. A. I know of none.

Q. This American Standard Specifications is dated October 16, 1958. Is there a revision currently being made? A. There is.

Mr. Capuano: Which one are we—excuse me, I thought you were referring—

[343] Q. (By Miss Thacker) I believe you stated that you were on the committee.

The Witness: P-7.

Mr. Capuano: P-7?

Q. (By Miss Thacker) I believe you stated— A. I am.

Q. And you have worked on the sections which have been referred to? A. I have.

Q. Are there revisions in them that differ from the way they are in the present form? A. They are being rewritten to take into consideration present methods in use by tile contractors throughout the United States.

Q. Now, does the thickness of the float coat or the setting bed vary? A. Yes.

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[351] Q. (By Miss Thacker) Mr. Bertolini, you have testified you have been in business, connected with this business since 1939? A. That is right.

Q. And you are familiar with the financial operation of it and the revenue connected therewith? A. Yes.

Q. Of your total operation in the bidding of your work how much comparatively entails or comprises or composes the float coat or the setting bed in your business operation? A. Well, last year I believe that we installed between thirty and thirty-three per cent of our tile in the conventional mortar method.

Q. What per cent in the one coat float coat? A. Hardly any. And the remainder would have been in the other two methods, or the other method, which would be the thin-set method.

Q. So then could we conclude, then, that if you did not have [352] the right to establish or to put in the float coat or the setting bed on this conventional method that you have had, that you would lose that, what portion of your business would that be? A. We would lose that portion of the thirty per cent which involve the installation of the final setting bed.

Q. Would that be a material part in the profit or loss of your business? A. I think it would be a definite problem in the loss of this part of our business since it generally involves the better quality jobs.

Q. The conventional method? A. Yes, yes. We are referring to the conventional method and because the elimination of this final setting bed would then, in my estimation, drop down the conventional mortar method jobs to an ordinary thin-set bed method, and that since these jobs generally involve quality installations, that they would then drop down in quality, probably loss of future specifications that would demand the quality of workmanship that I think can only be done when you install tile in the conventional mortar method and, of course, there would be the direct loss of that portion of the conventional method which would involve the final setting bed.

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[355] Redirect Examination

Q. (By Miss Thacker) Would you, Mr. Bertolini, be agreeable to continue putting on the float coat or the mortar setting bed if plasterers were to do the work? A. Probably not.

Q. Why? A. Because of the different methods employed between the tile setters and the plasterers in the installation of the final setting bed.

Q. You are saying the skill of the two crafts? A. I do not think the skill is equal.

Q. So then if you didn't care to have a collective bargaining agreement with the plasterers for that reason would you be able to give the same guarantee on your work if the plasterers put the bed in as if the tile setters put it in? A. Well, if the plasterers are working for me I would probably [356] have to give the same guarantee but, and I mention that I don't think that the plasterers and the tile setters have the same skill, I am specifically referring to only the installation of the final setting bed when I say the same skill.

Q. Yes, that is what my question was confined to. A. I don't want to be interpreted in the broad sense that there is an unequal skill.

Q. No, I limited it to the setting bed. So then if you do not feel that they have the same skills and you would prefer not to have a collective bargaining agreement with them, then you would not be apt to bid on those jobs which required a float coat or setting bed? A. I would not because the plasterer, if employed by me, would then be restricted to doing only one part of the work. I would use him for one day and then send him home. I wouldn't be able to use him to continue to set tile or in a bathroom he could only float the walls. Then when it came to the time of the installation of the tile he would be sent home. I would have to send another craft in his place.

When the time came to set the floors he wouldn't be able to do that. So I would have to hire a tile setter.

So this would be a very cumbersome method to install tile, even on a commercial job, when you would have to intermingle the trades under one, under the one contract.

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[369] Redirect Examination

Q. (By Miss Thacker) Is this the part that he had you read (indicating)? A. Yes.

Q. Would you read it again, please. A. "A. three thirty-second inch thick layer of dry-set mortar has twice the bonding strength of one-inch thick conventional mortar bed."

Q. All right. This three thirty-second inch layer of dry-set, is this referring to the bonding agent or is it referring to the setting bed?

Mr. Capuano: I am going to object. I don't think there is any word in there about bonding agent.

Miss Thacker: I have asked him the question.

Mr. Capuano: Well, there is nothing in there. She says does it refer to this and there is nothing in there that says it's a bonding agent.

Hearing Officer: Well, he ought to be able to answer it, I guess. If he can't he can't.

A. Oh, I can answer it. I was waiting to see whether I could or should.

Hearing Officer: Well, go ahead.

A. In the tile contractor's terminology, it refers to the bond coat because in the conventional mortar method we have the bond coat of neat Portland cement, and dry-set mortar [370] in the use, in the instance, or I am sorry, in the substitution of dry-set mortar in place of the neat Portland cement bond coat you have twice the bond strength.

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[415] ALLEN COLVIN

was called as a witness by and on behalf of the Tile Setters and, having been first duly sworn, was examined and testified as follows:

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Direct Examination

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[420] Q. (By Miss Thacker) Was there a picket established? A. Yes.

Q. And when did it go up? A. Well, we went to work at 8:00 o'clock, the men I had on the job, and approximately around 10:00 o'clock there was a picket put up on the job.

Q. And then what took place?

Hearing Officer: Well, first of all are we talking about the same day you had this conversation?

The Witness: Yes.

Hearing Officer: In other words, at 8:00 o'clock in the morning you had the conversation with Mr. Longshore and at 10:00 o'clock that same day a picket was established?

The Witness: That's right.

Hearing Officer: O.K.

The Witness: Well, immediately the people at Rainbo [421] Bakery called me and told me they could not have a picket on the job and jeopardize their bakery, so I immediately shut my job down in order to have the picket withdrawn, to protect Rainbo Bakery from any embarrassment.

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Q. That is what I wanted to get to.

Now, then, Mr. Colvin, will you tell us exactly what this [422] job consisted of? A. This job consisted of floating Portland cement mortar over a brick wall for the installation of ceramic tile in part of the baking area. The job was such that there was one long wall which had to bee floated, and I believe it was fifteen feet high.

At the present time we only had enough material in stock to cover six foot of the height of that wall.

The people at Rainbo Bakery who we had our contract with stipulated that they wanted that material, for sanitary conditions, to go six feet high, but they wanted all the mud floated so as to get rid of the mess in the bakery for health reasons. And that is what we proceeded to do. We floated half of the wall all the way to the ceiling. We put our tile up six feet high, and we were going to work a Saturday when the bakery was shut down to install the rest of our float coat and our tile.

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[423] Q. Now, could you define the setting bed that you installed on this job?

Mr. Capuano: He has not once used the word setting bed here.

Hearing Officer: Right. I think the record ought to be clear. Establish first of all—are you talking about a float coat?

Miss Thacker: We use it interchangeably. It's been stipulated to that.

Mr. Capuano: It has not.

Miss Thacker: We have used float coat or setting bed, mortar setting bed.

Hearing Officer: That is the same thing?

Miss Thacker: It's in the charge.

The Witness: Floating coat and setting bed is one and the same thing.

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[424] Miss Thacker: Yes.

Would you, Mr. Eagleston, read him back the question, please?

(The pending question read by the reporter.)

A. The setting bed on this job was installed over brick where we plumbed our walls, rodded our walls to a true, smooth surface, in preparation for the setting of tile.

Q. (By Miss Thacker) How long have you been a tile setter, Mr. Colvin? A. Since '38.

Q. You have worked at the trade this entire time? A. Outside of a few years I was in the Army.

Q. Has there been any change, to your knowledge, in the setting bed or float coat during this period of time? A. It's the same thing as when I started.

Q. Is it to the advantage of the tile setter and the tile contractor to float the work first? A. Yes.

Q. Why? [425] A. Well, due to the fact that tile comes in different sizes and shapes, you almost have to have your tile on the job for your lay-out, for your sizes, and so on and so forth, like on ceilings and jambs and headers and soffits. Some of this work even has to be prefloated because the humidity and the weight of the sizes of tile will not take in the same day that the preparation has been made.

Hearing Officer: May I ask him a question, what it means to float?

The Witness: To float, in our business, if we take, for instance, this wall, we set a wooden lattice strip up each end of this wall, plumb and square with the room, we take a hawk and trowel and float the Portland cement mortar in between these trips, a straight edge and rod it back to the strips to where you get a smooth surface to receive the tile.

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Q. (By Miss Thacker) This is T-8 for identification previously entered, dated March 15, 1967, clarification letter, with particular reference to page two, the second paragraph, where the Joint Board refers to the fact, or [426] rather makes the decision that the work that is set during the same work day in which such coat is applied the plaster materials shall be applied by tile setters in the interest of efficient job operation.

Is this feasible? A. No.

Q. Would you tell us why, Mr. Colvin? A. Well, like I said a while ago, humidity, sizes and weights of tile has

a whole lot to do with it, and at the same time it jeopardizes our contractors to the extent that we are placed to do so much work, maybe we have to go home at 3:00 o'clock in the afternoon because we can't float no more work because we wouldn't have time to cover it up, or maybe we have got to stay there and charge the man for overtime to stay there until after working hours to cover it up. It's impossible to lay your work out from day to day to give your employer a full eight hours work and say that you can float only so much and that has got to be covered up.

Q. Would you tell us how you actually go about applying the float coat and what you must take into consideration in its application? A. Well, first in consideration of the application you have to take the size of the tile, you have to have the tile on the job. To lay out your tile work you have several different kinds of trim pieces. They have to be measured [427] where your jambs and different things of your tile will fit. Some specifications call for full tile, or so on, around door jambs and stuff of such nature.

Without this tile and every factory that puts out tile, there are different sizes, you can't just pick up one piece of tile and say this is it because if this tile for this particular job comes from another factory it may be an eighth of an inch bigger in size, and you have to lay this work out, and I know on most all jobs I go on I lay my tile out on the floor and lots of times make me a guage stick and mark it for my measurements of my room, and without that you just can't do a float job good enough to receive tile good.

Q. To your knowledge is the tile available on the job if a plasterer puts on this bed? A. No, it is not.

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[432] Q. Now, on this March '67 clarification you stated that the decision as rendered by the Board, did you not, that it was the recommendation that it was tile

layer's work being what he could float and cover the same day, and you say this is not feasible. A. No, it is not.

Q. Why? What would happen? A. Well, first it's impossible to lay out your work to where you can give your employer a full eight hours work per day and still be limited to the time that you can go to work and do certain things and then turn around and cover it up—

Mr. Capuano: I am going to object. It sounds to me like it's repetitious of what he just told us.

Miss Thacker: Let him finish, please.

Hearing Officer: Let him go ahead.

Mr. Capuano: O.K.

Hearing Officer: Go ahead. Do you need to refresh your recollection where you were? Would you read—

A. Well, we have lots of instances on jobs where you have ceilings and arches and of such nature that has to be pre-floated. It's impossible to take a ceiling and float it and [433] put tile on it the same day that you float it out because the way we work with our tools, you float this out, although the material is hard, when you butter your tile and go to tapping it in smooth, it breaks the bond, and it won't stay there. It has to be set hard and firm where it will take the punishment of the installation of the tile work.

Q. (By Miss Thacker) What would happen if you would put quarry tile on a wet setting bed? A. It would sag, fall down. You see, your quarry tile, of course, what you call a wet setting bed, some setting beds are a lot wetter than others. It all depends on the time you give it to dry before you get started to work on it. But a quarry tile runs in sizes up to fifteen by twenty inches and two inches thick, and when you hang that surface with the weight onto a wet setting bed it just won't hold it.

Q. Now, if you are using ceramic tile, and you apply it on a wet float coat, and then you begin to work with the tile, what happens? A. It moves. It gets out of

line. It sags. And when the material does that you cannot straighten it up, you cannot make a uniform job. And through trying to get a smooth surface you break your bond and you just don't have a job.

Q. Now, where the plasterer puts on a skim or scratch coat and then the brown coat, is his final coat to be scratched? A. According to the 1917 agreement it's supposed to be [434] scratched. If you will read the article of agreement in the green book it will tell you.

Q. If this final coat, the plasterer's final coat, is not scratched, can you put on your setting bed, that is, if his coat is left smooth? A. Not and get a good bond.

Q. Why? A. Because the scratching of the surface is what, roughen it up, is what forms a good bond on your material. A slick surface, it dries out and it's slick, and it's easy to fall off.

Q. Are you aware of any requirement in the 1917 agreement that tells or specifies when the tile layer shall apply his final setting bed? A. There is nothing in the 1917 agreement that tells us when or how to get our final setting bed or the tile, either one.

Q. Is there anything in that agreement that you are aware of that says that the setting bed must be wet or dry at the time the tile setter applies his tile? A. It does not.

Q. Now, as to the bonding agent, itself, with the advent of the bonding agents currently in use, has there been any change, has this introduction of these agents brought about any technological changes?

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[435] Miss Thacker: Would you read back the question for him, please?

(The pending question read by the reporter.)

Hearing Officer: First of all, before you answer that maybe you better define for the Board, as well as myself or anybody else reading the record, what bonding agent is.

The Witness: A bonding agent is a material used to bond the two materials together.

Hearing Officer: O.K. Now, do you recall the question that the reporter read you?

The Witness: Yes, sir.

Hearing Officer: Would you answer it?

The Witness: Yes, there has been some changes to the extent that there's been a retarder put in the bonding agent whereas to allow you to work over hard surfaces or pre-floated [436] work that will not let your bonding agent dry out too fast. It cures on its own without any moisture taken out of it from the substance behind it or before it.

Q. (By Miss Thacker) Can the bonding agent in any sence be referred to or can it be considered a setting bed? A. No, ma'am.

Q. Why? A. Well, a bonding agent is strictly just—it's a material to stick the two materials together and bond it. Now, floating is a material you use to straighten up your wall, to plumb your wall, to square your room. And your bonding agents cannot be put on a surface over an eighth of an inch because it will run down to the floor, and it's impossible to try to straighten up any irregular, well, any way to straighten up any defects in a wall or anything of that order.

Q. Are you saying, then, that you cannot set your true dimensions with the bonding agent? A. No, we cannot.

Q. Now, where you, the tile setter, puts in the setting bed or float coat, can you guarantee your work? A. We do guarantee our work where we do our own floating and installation of our tile.

Q. Where some other craft has put in a coat of mortar prior to the application which you do of the bonding agent and the tile, can you guarantee your work in the same quality? [437] A. No, ma'am.

Q. Why? A. Well, work that is being performed in that manner is always the walls are irregular, they are

out of plumb, they are out of square. You have many defects in the walls that you cannot give a true, what we would call a satisfactory job.

Q. Could you tell us the actual process that you use to plumb a wall or surface after the plasterer has already rodded, squared and plumbed it? A. I don't know whether I understand the question.

Q. Well, I am assuming that some other craft, the plasterer, has put on a coat which is either his scratch coat or the brown coat, and according to the 1917 agreement it requires him to plumb, rod and square and scratch. Is this a preliminary or a final, so far as plumbing, rodding and squaring is concerned? A. No, because once he scratches the wall we are supposed to have approximately one inch to plumb and square and float our own wall to a true surface to receive our tile.

Q. So then you do additional work? A. Yes.

Q. Now, are there factors besides rodding, plumbing and squaring that you must keep in mind when you put on your float coat? A. Yes, you have to keep in mind your kinds of material you [438] are using for tile, the lay-out, dimensions and so forth.

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[440] Q. (By Miss Thacker) Now, Mr. Colvin would you explain the [441] use of the screed and the purpose for it? A. The screed we use to plumb on a wall for the purpose of rodding our straight edges over it that it won't dig into the mortar and leave a true surface.

Q. Now, in this particular job at Rainbo—

Hearing Officer: Excuse me just a second. Is this some kind of instrument that you use, a tool?

The Witness: The screed that we are speaking of in our business, we use a wooden strip. It's about an inch and a quarter by a quarter of an inch thick. We use these to plumb up a wall, then rod our float coat off of that.

Hearing Officer: O.K. You have got to remember, I am a novice or a layman at this terminology, and I would

like to know, and so would the Board, I am sure, what each of these terms is.

I am sorry, go ahead.

Miss Thacker: That is all right.

Q. (By Miss Thacker) Now, Mr. Colvin, on this particular job at Rainbo, what dimensions did you have to work to? I mean by that how much room did you have? A. We were instructed by Rainbo to hold our walls as close as possible so that we wouldn't bring them out any further than absolutely necessary, to straighten them up.

Q. Was there room for a coat to be applied by the plasterer? A. No. There was no room for this coat because on this [442] particular wall Rainbo has conveyors where there are bread pans and things run up and down on the wall that are sitting right practically on the wall, and we had to hold our material behind those conveyors to keep them from having a great cost of moving all their equipment out away from it.

Q. Now comparatively, I am speaking as to the time of the tile setter, what is the comparative time that it takes the tile setter to apply his float coat or mortar setting bed and the time that it takes him to put on the bonding agent and the tile? A. Well, a lot depends on what type of work. Ordinarily speaking, I would say sixty-five or seventy percent of your time is on your float coat, and the rest of that time would be for the installation of your tile work.

Q. Where does the real art of the craft rest? A. In the float coat.

Q. Did you come into the, come to be a tile setter through the apprentice program? A. Yes.

Q. How long did you spend, comparatively, in the program learning to apply the float coat? A. Three years.

Q. Out of a total of how much time for the total program? A. Our appentice program is a three-year program, and we serve the whole three years.

[443] Q. But are you saying, my question was about how much of that time did it take you to learn to prop-

erly put in the float coat or setting bed? A. I would say fifty per cent.

Q. Fifty per cent.

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[451] Q. Now, at the time that the plasterer puts in his final coat of plaster material, does he have before him the dimensions that's necessary to be known to set the tile? A. He does not have the tile to lay out any dimensions.

Q. So then he doesn't know, or rather should I say this, does the plasterer in installing this final coat of plaster material, does he have available to him the specs. for the laying or setting of the tile? A. Not to my knowledge.

Q. Is it possible for him, the plasterer, to plumb, rod and square in a final form without the specs. and the final dimensions which are required for the tile installation? A. I would say no and the reason I would say no is because if he don't have the tile and the shapes of the tile he doesn't know what the dimension is or anything else to float to make our tile work to certain points in certain areas.

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[452] Cross Examination

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[454] Q. Now, were you following any specifications on that job or were you just putting the mortar up or how was it being done? A. The job was floated in the regular manner like we always—

Q. Well, I understand that. But were you given any written instructions or specifications on how to do it? A. No, sir, Mr. Stevenson of Rainbo Bakery, who we have our contract with, instructs us as to what he wants in the area he wants covered, and so forth.

Q. Who is Mr. Stevenson? A. He is the chief engineer and chief building construction [455] man for Rainbo.

Q. And he told you what he wanted covered? A. Right.

Q. Did he tell it to you? A. Yes, sir.

Q. And you told your men what to do? A. Right, sir.

Q. But you didn't receive any written specifications or instructions how to do this? A. No, sir.

Q. Let me show you what has been marked T-7 and ask you if you have ever seen that before? A. This particular item I have never seen, no, sir.

Q. Do you know what it purports to be? A. I believe I do, yes, sir.

Q. What does it purport to be? A. It's a system for us to install our tile.

Q. What is it entilted? A. Sir?

Q. What is it entitled? A. What is it entitled? It's entitled Specifications.

Q. For the Rainbo Baking Company job, isn't it? A. Right.

Q. You have never seen it before? A. No, sir.

[456] Q. You were the superintendent on the job? A. Right.

Q. Now, would you tell me again just what you had to do on that Rainbo job? What work were you doing? I am not talking about the particular task of putting up screeds. I want to know what work you as a representative of Martini or Martini Tile Company had to do on that job. A. On that particular job my job was to see that I got men on the job.

Q. No, that is not what I mean. I mean the actual work, you had to put tile on some walls, I understand. A. Right.

Q. All right.

Now, tell me where the walls were, the kind of tile you were putting on, and what else you had to do as part of Martini's job there. A. Well, first we put metal lath—

Q. No, no, tell me where you were putting this stuff. In other words, I am trying to get a picture of what Martini did in this bakery. Now, you have got a big

room, I presume, with some baking machines. A. In the panning room.

Q. In the panning room? A. Pan, panning room.

Q. Panning room. That is where they bake bread, right? [457] A. Right.

Q. All right.

You had to do some work in the panning room. What work did Martini have to do there? A. Install some tile.

Q. Where? A. On the two outside walls in the panning room.

Q. All right. Now, how big were these walls, how long? A. I would say one of these was forty feet by fifteen and the other one was approximately sixty, sixty-five feet by fifteen.

Q. All right.

And Martini had to install tile on these two walls in the panning room. Now, I wasn't quite clear on what you said. The tile went up six feet? A. The tile went all the way to the ceiling, but at the time of the installation, which the job is there right now without it all the way up, we only had enough tile to go six feet on these walls. The other is on order, which will be installed when it arrives in the city.

Q. All right.

I think I have got the picture now. You had these two big walls, you tiled up six feet, but you put mortar above the six feet to the ceiling, which is about fifteen feet? [458] A. We floated it all the way to the ceiling.

Q. All right. You call it floated. And are you going back at some later time and going to put the tile from six feet up to the fifteen foot ceiling when the tile comes in, is that what you are saying? A. That's right.

Q. All right.

Now, was this glazed ceramic tile? A. It was four and a quarter by eight and half glazed ceramic tile.

Q. Four and a quarter by eight and a half? A. Right.

Q. O.K.

One piece, you mean, four and a quarter by eight and a half? A. Right.

Q. O.K.

Now, when you go back, when you go back to put up the rest of the tile, the walls you have got there will be as dry as the wall right in this hearing room, walls in this hearing room, won't they? A. They will be dry, yes, sir.

Q. All right.

Now, tell me how you will go about putting on the remainder of the tile above the six feet when you go back. [459] A. Our bonding agents that we have today has a retarder. The wall above what we installed will be installed exactly the same as the six foot already on there.

Q. Now, I will ask you again. How will you go about putting the tile from the six foot up to the ceiling? What will you use? A. We use L. & M.

Q. L. & M.? A. Concentrate, Portland cement.

Q. All right. You say concentrate. You mean you will put that concentrate in something else or will you use it just as it comes, or what? A. The concentrate is, in itself, is a retarder that we put in the Portland cement which we use as a bonding agent.

Q. You mean you will take a bag of Portland cement and you will add something to it? A. Right, the retarder.

Q. You will take this L. & M. concentrate? A. Right?

Q. Add it to your bag of Portland cement, mix it with water? A. Right.

Q. And then you will put it on your wall with a notched trowel, huh? A. Right.

[460] Q. That is the wall above the six foot. A. Right.

Q. And then you will put your tile right in that, is that the way you will do it? A. That's right.

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Q. If you wanted, if you found a little place there that wasn't quite level, you could add some sand to it, use

it as a leveler, couldn't you? A. Not to use as a leveler, no, sir.

Q. You couldn't use that as a leveler with a little sand in it? A. No, sir, you cannot.

Q. All right. How long have you been using L. & M.? A. Since it came out. I believe in the 1950's sometime, '55, '56. This material can't be used as a leveler. In the first place it sticks to a straight edge. You cannot rod it and make a smooth surface. In the second place, if you put it on heavy, it runs down the wall.

Q. All right.

Are you aware that L. & M. takes a contrary position from you and says with some sand in it it can be used as a leveler? [461] A. I have read some of their specifications.

Q. But you say what they say isn't right? A. I do for a fact because I have tried it.

Q. O.K. And L. & M. was made or developed right in this area, wasn't it? A. I believe in Waco, Texas.

Q. By Mr. Montgomery? A. Yes.

Q. And Mr. Love. A. Right.

Q. That is where it got its name, wasn't it? A. Right.

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[463] Q. Do you know if the Tile Contractors of America have ever taken a position that dry-set mortar such as L.&M. can be used for leveling and clearing up irregularities in the walls that you are going to put tile over? A. Well, we are speaking in a broad sense. It all depends on what you mean by leveling, and so on and so forth. I am saying this, you cannot take L.&M. and put it on a wall three-eighths to a half inch thick to level or plumb something with.

Q. Oh, now you are talking about three-eighths or a half inch. I don't recall that I said that in my question, did I? A. No, you didn't.

Q. But that is what you meant, you can't use L.&M. like you would use a thick setting bed, is that what you are saying? A. No, you can't.

Q. All right.

But are you agreeing with me now that it can be used to [464] level minor irregularities in a wall? A. That depends on how minor.

Q. How about three thirty-seconds of an inch? A. I would say yes.

Q. It can be. All right.

Now, would you say the bonding strength of three thirty-seconds of an inch of L.&M. is comparable to about an inch of conventional mortar bed? A. I would. I would say it might be even greater.

Q. It might be greater. A. That's right.

Q. That means it's going to hold the tile on the wall better than that thick mortar bed would, wouldn't it? A. The thick mortar bed won't hold tile on the wall.

Q. The thick mortar bed won't hold tile on the wall, itself? A. No, sir.

Q. All right.

There is going to be a greater bond between the tile and the mortar with this L.&M. than there would be if you are putting it in a thick bed, correct? A. Well, I don't know as I understand what you are talking about, trying to get to.

Q. All right, let me change it for you again.

Let me ask you something else. We will come back to that. Did you use a lather from the very beginning of that [465] job? A. Use a what?

Q. Lather. A. Lather?

Q. Yes. You said you used a lather for two hours and then they struck and then you used a tile setter, but you didn't tell us who was doing the work from the very beginning, putting up the metal lath. A. We started it.

Q. Who is we? A. The tile setters I had on the job.

Q. Oh. Then you switched to a lather? A. Right.

Q. Now, what sort of lath are you using here? A. Metal lath.

Q. What does that look like? Is that the same as the expanded metal lath? We had some testimony about that.

A. No, you might interpret it that way, but I wouldn't say it was expanded metal lath.

Q. What was it, then? A. I wouldn't know how to explain it.

Q. What did it look like? Did it look like chicken wire? A. No, it's a lath with little, small quarter-inch holes in it.

Q. You mean it's pieces of metal with quarter-inch holes [466] in it? A. Right.

Q. And you nailed it right to this brick wall? A. Right.

Q. Now, you said you put your mortar on the wall. How much mortar did you put on the wall in this mortar coat? A. I would say an average of a half inch.

Q. A half inch. And you said you plumbed and you rodded the wall, correct? A. Right.

Q. And then did you set your tile the same day or did you come back the next day or several days later and set your tile? A. We set some of it that day. We set some of it the next day. Fact of the business, we set some of it a week afterward.

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[467] Q. All right.

Now, I am going to show you Plasterers' Exhibit 11, which purports to be a booklet put out by the L.&M. Company on thin-set methods. Now, this is the same company that produces the concentrate that you use, isn't it? A. Yes.

Q. I am going to ask you to look at page six, Section III, Installation. I have it marked here.

Do you see that, where it says A, "Setting bed to receive tile"? A. Yes, sir.

Q. See the section? A. Yes, sir.

Q. Would you read that to yourself? A. (Witness complied.)

Q. Now, the setting bed to receive tile that they are talking about there is the L.&M. that you used, isn't it? A. No, sir.

[468] Q. It isn't? What is the difference between what you used and what is listed there? A. The setting bed to receive tile.

Q. Isn't it true that L.&M. calls its product which you used a setting bed and you call it a bonding agent? A. They call it a setting bed, they call it thin-set.

Q. I am asking you what L.&M. calls it in Plasterers' Exhibit 11, on page six, Section III. A. Well, it says setting bed to receive tile, mortar to be mixed thoroughly and applied in strict accordance with manufacturer's recommendations. Minimum thickness of setting bed to be three thirty-seconds to one-eighth maximum.

Q. That's right. And they are talking about the same material that you are going to float on that wall with your notched trowel and put your tile to above the six-foot level when it comes in, aren't they? A. That is what they have reference to.

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[475] Q. All right.

Let's take the normal practice. When you put your final setting bed on, isn't the recommended procedure, talking about the conventional method, to apply your tile the same day that you put that setting bed on? A. A bathroom wall we tried to put it up the same day, yes.

Q. That is the recommended way, isn't it, in a conventional method? A. I don't believe it says anything in this book anywhere that it recommends that we put up our tile the same day we float it.

Q. Did I ask you any questions about that book? A. No, sir. You asked me if it was recommended.

Q. That's right. A. Well, I don't know anywhere where it says it is recommended.

Q. Let me show you a place. You have heard of the American Standard Specifications, haven't you? You have seen specifications for the installation of tile, which is P-8? A. I have.

Q. I am sorry, P-7.

I am going to show you P-8, page eight. It's under American Standard Specifications for Glazed Ceramic Wall Tile [476] Installed in Portland Cement Mortars, Section 1-2, Walls, 1-2.3, under the Workmanship and Application. Look over 1-2.5d. Read that to yourself. Just d. A. (Witness Complied.)

Q. Did you read it? A. Yes, sir.

Q. And you say that is not a recommendation that you are not supposed to put tile, glazed ceramic wall tile, on a mortar bed that isn't still plastic? A. Back in the time when this was written we tried to cover our mortar beds when they were still wet.

Q. How long ago do you think this was written? A. I don't know.

Q. 1958.

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Q. (By Mr. Capuano) In the conventional method, isn't that [477] correct, what I just said, the recommended procedure is to install it the same day while it's still plastic? A. If possible.

Q. Is it or isn't it the recommended procedure? A. Yes.

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Q. (By Mr. Capuano) Did I understand your testimony that on page two, paragraph 2 of the Joint Board's award, that you said it was not feasible to apply tile to walls the same day that the float coat is applied, as the Joint Board says in there? A. Yes, sir.

Q. Didn't you just finish telling me that in the conventional method the recommended procedure was to apply tile the same day that you put the mortar coat on the wall? A. Yes, sir.

Q. But still you say it's not feasible to do that very procedure? A. Well, we are talking about two different things here.

[478] Q. No, we aren't. We are talking about applying tile the same day that you apply the mortar coat.

A. You can apply the tile even the same day as you apply the mortar coat.

Q. The way the Joint Board said you could, can't you? A. It can be done.

Q. All right. A. Some circumstances this can't be done.

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[479] Q. Now, you said that there are certain advantages of floating a wall out first, as I recall. Now, when you are using these thin-set mortars like L.&M., Crest, Laticrete, you don't have to soak your tile, do you? A. No.

Q. The conventional method you had to soak your tile before [480] you put it in, right? A. We soaked it, yes.

Q. That is a big advantage, isn't it? A. Yes, but today the conventional method the tile doesn't have to be soaked.

Q. Now, will you let me ask the questions and you give me the answers? A. Well, maybe I misinterpreted you. You asked me if the conventional method, whether we had to soak our tile or not.

Q. And you said yes. A. Well, today the conventional method if you talk about putting it up over wet mortar, we don't have to soak it.

Q. If you use one of the thin setting bed materials, correct? A. If we use L.&M. or Kaiser, Crest.

Q. That's right. A. Right.

Q. O.K. I think we are in agreement.

You say it's impossible to lay work out day to day, give your employer a full day's work. I believe that was your testimony, wasn't it? A. That's right.

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[485] Q. (By Mr. Capuano) Now, Mr. Witness, you say unless you put on the float coat, as you call it, that you can't do a good job with your tile, that you measure out your tile and you do this apparently when you are

putting on your float coat. Is that what you were trying to say? A. I believe when we float our work we lay out our tile.

Q. All right.

So in other words, if you got this wall over here, you would lay out your tile so that maybe you would get a half [486] a tile at the door buck, something like that, is that what you are telling me? A. That and the height.

Q. And the height. All right.

Now, supposing we had a sheetrock wall over there or dry wall, do you know what I mean by sheetrock? The reporter can't get your nod. A. Yes, sir.

Q. And you had the same door bucks in there. Now, when you were going to put tile on the sheetrock you would use some sort of thin setting bed material, either an organic or an inorganic compound, wouldn't you? A. You have to use some kind of a bonding agent to make it adhere to the wall.

Q. All right.

We would use something like L.&M. or Crest or one of these products, right? A. Right.

Q. All right.

Now, would you also lay out your tile so that you wouldn't wind up at the door buck with only a third of a tile? A. Yes, sir.

Q. You would lay it out the same way, wouldn't you? You would measure that wall so you wouldn't wind up with a little [487] bit of a tile at the top or a little bit of a tile at the door buck, right? A. I would.

Q. You would try to get, maybe, take it up in the joints, spread your joints a little bit, or pull them together, or something like that, wouldn't you, joints in the tile? A. I would try to center the wall and work from both ways.

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Q. All right.

[488] Let me ask you this, supposing the specifications said that tile is to be installed in the setting bed which

is to be three-eighths of an inch thick, a half inch thick, while the setting bed is still plastic. What would that mean to you? A. That means just what it says, while it was still plastic.

Q. Would it be plastic a week later? A. No, sir.

Q. It would be plastic the same day, wouldn't it? A. Yes, sir.

Q. And you should put the tile in the same day, right? A. Yes, sir.

Q. According to you that is not feasible, is that correct? A. Not in all cases.

Q. Oh, not in all cases.

So in other words, your opinion regarding T-8, the Joint Board award, is actually that there are cases it isn't feasible to install tile the same day; is that what your testimony amounts to? A. There's jobs you can't install the same day.

Q. But it doesn't apply to all jobs, by any means, does it? A. No.

Q. And that same answer would be equally true as far as arranging your work, there may be some jobs where you can't set the tile the same day but there are jobs where you can set [489] it the same day and arrange your work so that you can do it, aren't there? A. Yes, there's jobs where you can put tile over a wet mortar. You could do it every day.

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[491] Q. Well, let's take an average day, as I say, about seventy, seventy-five degrees, normal humidity. You are doing bathrooms in an office building. I am trying to find out approximately how many hours would it take for that wall to cure, as you put it, so that you could start setting tile? [492] A. In a conventional method I can't give you no definite answer, but as a general rule we float on a room or a wall until noon or a little after, and then where we started in the morning we go back to that area—

Q. And start setting your tile? A. —and start setting our tile, providing, as I say, it has cured enough to receive it.

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[494] Q. Well, I am using the example that you gave me, that this is what you would normally do, float out in the morning, put the tile on in the afternoon. In your example the tile would not normally fall off the wall, would it? A. That's right.

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[497] Q. Thank you.

Now, you told us, I believe, that in the 1917 agreement back on page 32 that the plasterer must scratch his brown coat but there are no restrictions whatsoever on the tile layer as to when or how or in what manner he puts on the setting bed, isn't that what you said? A. I believe so.

Q. Now, why did you say that this agreement requires the plasterer to always scratch his brown or plumb coat? A. Well, it says right here, if I am allowed to read—

Q. You certainly are. A. —they shall plumb, rod, square all walls and scratch the same so as to guarantee adhesion to the final coat which shall be put on by the tile layer to act as a bed for his tile.

Q. In other words, because it's listed there you say it must be done every time, is that your position? A. If it's not done we don't properly get a bond between the two.

Q. Supposing you had a situation where the tile layer did not want the brown coat scratched because he was going to use [498] L.&M. to put his tile up. Are you saying that he would have to, the plasterer would have to scratch the brown coat? A. Not if he is going to receive tile on it.

Q. You mean if they are going to use L.&M.? A. If you are going to put tile on a coat that they float and use a bonding agent to stick the tile to it, we definitely cannot have it scratched.

Q. So you wouldn't want it scratched in that situation? A. Not where we are going to put tile on it.

Q. All right.

So then he doesn't have to scratch every brown or plumb coat he puts up, does he? A. I guess he does not.

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Q. Let's take an example. Supposing there was concrete block on that wall, and you are going to put tile over it with L.&M. concentrate or, you know, you are going to mix your concentrate and your Portland cement mortar, or you are going to use it pre-mixed. What would be the setting bed over there? A. The setting bed, there wouldn't be any setting bed. The brick, itself, is the setting bed.

Q. The brick, itself. Do the tile layers claim the brick? A. No, sir.

[499] Q. Or if it was concrete block they wouldn't claim that either, would they? A. No, sir.

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[501] Well, then that is who I am referring to, the Martini Tile Company. If the plasterers had put the float coat on the Rainbo Bakery job you would still be responsible for your work, the tile work, the work you did, generally for a year, isn't that correct? A. Mr. Martini would be, yes, sir.

Q. Right.

And if you would put the tile directly over the concrete block wall, if you could have in that situation, you would [502] still have been responsible for the tile work that Martini did, right? A. That's right.

Q. You wouldn't claim responsibility for whether the bricklayers had put up the concrete wall properly, would you? A. No. sir.

Q. Now, if Martini had gone into or started to go into brick work and if his own forces put up the concrete brick wall, then Martini would probably have to guarantee the brick wall, too, wouldn't he? A. I guess so, if he was in that business.

Q. In other words, he is only going to guarantee whatever he does, correct? A. That's right.

Q. You said you had some equipment along the walls there that you had to work— A. Yes, sir.

Q. —in between or something? A. Conveyors.

Q. Conveyors.

Were they actually attached to the wall or— A. They were right against the wall.

Q. Right against the wall.

So what did you do, run your tile up to them and then start on top of them, or something? [503] A. Yes, sir.

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[504] Q. Now, isn't it a fact that when you generally get in a room you have, say a bathroom in an office building, you have certain dimensions that you must meet, right? A. From corner to corner on a straight wall the dimensions are approximate.

Q. Well, isn't it true that you will have things like plumbing fixtures, shower heads, faucets, that you have to meet them, you can't put two inches of mortar on the wall and cover up the plumbing fixtures or come out beyond the pipe or the plumbing fixtures. A. No, sir.

Q. So you have to hold back enough so that they have the right extension beyond your tile, right? A. On most plumbing fixtures you have a certain amount of tolerance, and if you lay your tile out you can build your wall out a little more or a little less to make it work better with the tile.

Q. But you just can't disregard all these other crafts in the room and lay out your tile to get it the way you want [505] it, can you? A. No, sir.

Q. Supposing you have got a wall, a four-inch wall with a six-inch door buck, and you are going to put tile on both sides of the wall. You know what I mean by door buck, don't you? A. Yes, sir.

Q. A door frame, right? That only leaves you one inch on either side of the door, doesn't it, either side of the wall, doesn't it? A. Four-inch partition?

Q. Yes. A. Yes.

Q. So you can't put on an inch and a half of mortar just because you want to build out your wall to make your tile fit better, you have to put your mortar out on your wall so you would come no more than flush with the door buck, generally, correct? A. That's right, if you have got one inch you couldn't put no more than five-eighths of mortar on the wall.

Q. All right. Fine.

You have to meet the door buck, right? A. Of course, this governs, too, according to the thickness of the tile you are using.

Q. That's right. And generally the door bucks will be [506] installed before you start putting your tile up, won't they? A. Yes, sir.

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[507] Q. Now, when you were foreman on jobs for Martini isn't it a fact that the plastering foreman, if he were putting up the back-up for the tile, would confer with you on how you wanted your work, how you wanted the back-up installed, what type of tile you were going to use? A. No, sir, because most cases it's already up.

Q. So you are telling me that you have never had a plastering foreman on the job confer with you whether you had any special requirements for the back-up to the tile? A. I have had talks with plastering foremen as to the requirements of what we had to have, yes, sir, but most of their work is already done when we come on the job.

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[514] Do you know of any jobs in town right now where tile is being applied directly to block walls? A. Myself, no, sir.

Q. You don't.

Have you applied it directly to block walls? A. Yes, sir.

Q. Do you find your architects are calling for that more and more? A. It's being done quite often, yes, sir.

Q. Would you agree with me that it's a fair statement that since 1957 the dry-set mortars, thin-set method, thin-set materials, have allowed tile contractors and architects to use [515] tile in areas where previous to that time tile may not have been used because of its cost? A. I believe that there's lots of cases they put tile where ordinarily they wouldn't have.

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Q. Do the helpers actually install the tiles? A. No, sir.

Q. I mean, put the tiles on the wall. A. No, sir.

Q. Why don't you let the helpers put the tile on the wall? A. Because that is our job, that is what we are getting paid for.

[516] Q. Well, can they do it? A. I don't believe they could properly.

Q. Why not? A. Satisfactorily. They don't have the skill.

Q. What skill is there is putting the tile on the wall? A. Well, I don't know, I served three years learning how to do it.

Q. I am talking about the actual putting the tile on the wall now. A. It's skill in leveling up your base coat and running your joints square and straight.

Q. You mean the joints of the tile? A. Yes, sir. See that the surface of the tile is smooth.

Q. What else? A. Just anything that pertains to tile work, giving a satisfactory job for the owner or the people that's paying for it.

Q. So then the whole art of it isn't just in the float coat, is it? A. The float coat is the most important step in tile work.

Q. When you are putting— A. It's the foundation for it.

Q. When you are putting tile on that sheetrock wall you have to keep the joints of your tile nice and straight

and your base nice and straight, don't you? [517] A. We try our best.

Q. Well, there is no— A. We have to follow whatever is there.

Q. Of course, but as far as the joints of your tile you certainly try to keep those straight, don't you, just like you would if you would put on the float coat? A. We do our best.

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[527] Miss Thacker: I am trying to ask where the float coat or setting bed exists.

Hearing Officer: That is a good question.

Q. (By Miss Thacker) We have established that it exists in the conventional method, have we not?

Mr. Capuano: Well—

A. Yes.

Q. (By Miss Thacker) All right. The coat of mortar that is put in in the one coat float coat method is a setting bed or a float coat, is it not? A. Yes.

Q. All right.

In the thin-set method, the tile setter applies the bonding agent and the tile. Can it be construed as a float coat or setting bed? A. Not in our line of work. The thin-set material we use is strictly a bonding agent.

[528] Q. A bonding agent? A. And cannot be used as to float a wall or anything in that manner.

Q. All right.

Now, I want to ask you about the Rainbo job. Hasn't there been considerable work done on that job? A. We have been working on that job for years.

Q. So that it is a, this particular job that you did on March 17 on which the picket went up was a part of a continuing job, is that correct? A. I believe that Rainbo Bakery had already bought the tile for that particular area that had gone up.

Q. So was this a repair job? A. No. When I say no as to a repair job, it could be in a sense maybe a repair job because they took out outside windows, they bricked these windows, they plastered them on the outside and

tiled them on the inside. Now, you could say that was repair work. As far as the bakery is concerned I presume that it's repairing and so on.

Q. Would you consider it an alteration job, then? A. I would consider it alteration on the part of the bakery, yes.

Q. Is it usual in that type of work to have the same sort of specifications that you have on a new job? A. No, because on that particular job we are working under [529] the direction of the Rainbo Bakery, like I told my men and I have been instructed, to do whatever they want you to do.

Q. You mean as a part of a continuing agreement? A. That's right. If they want, they decide they want tile on this other wall, put tile on that other wall. If they want to add onto this floor, put it wherever they want it.

Q. Now, then, one other question I want to ask you about the float coat or setting bed. What is the normal thickness of it? A. It will vary from—it depends on what is behind it, but the normal thickness, I would say, would be from a half to five-eighths of an inch.

Q. And isn't it also true that there may be a variation throughout the surface, that it will not be all five-eighths or all three-eighths? A. Some of it may be an eighth of an inch clear up to three-quarters of an inch. It always depends on what you are working over, how straight the surface is behind what you are working over.

Q. What is the normal thickness fo the bonding agent when applied? A. Anything up to an eighth of an inch. That, too, depends on the sizes of tile. The smaller tile you use the less thickness you use. The larger tile you use, you put it on up [530] to an eighth of an inch thick to insure a better bond.

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[544] Recross Examination

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[545] Q. Now, when you use various materials do you follow the manufacturer's recommended instructions how

to use it? A. I do to the best of my ability and know-how. Also I follow the architect's specifications.

Q. Would you look at T-4, please, going to the 1917 [546] agreement?

On redirect yesterday you said that the 1917 agreement doesn't tell the tile layers how thick his setting bed should be or must be. Is that correct? A. I can't see in here where it says, specifically how thick it's to be.

Q. So that means it could be as thin or as thick as you wanted it, then. A. I gather that.

Q. You could have it as thin as an eighth of an inch, then, couldn't you, under the agreement? A. Yes, sir.

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[547] Q. And you didn't know you had to go all the way up to the ceiling? A. I knew we had to go, but I also knew we didn't have the tile to go all the way.

Q. Well, that was just what I asked you. You knew you were going to later put tile on it— A. Right.

Q. —but you didn't have it there to do it immediately, is that right? A. I believe that's right, yes, sir. I think I answered that one question.

Q. Now, when you say float out a wall what does the word float mean? I am not talking about a coat. I mean when you use it as a verb and you say "I floated out the wall," what do you mean by float? A. Applying the Portland cement that it takes to straighten and plumb a wall.

Q. Well, you mean putting the mortar on the wall, right? A. Right.

Q. Spreading it on the wall? A. Right.

Q. That is what you mean by float, right? A. Right.

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[548] Q. Yes, I would say that is what I am talking about.

Now, when you testified yesterday on redirect you were asked a question about one float coat being your setting bed. Do you consider that the job you did was something

called a one float coat out here, the one float coat method out here at Rainbo Bakery? A. Yes, sir, it was, it was applied with one coat.

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[549] Q. All right.

Now, when you spread your L.&M. on this dry mortar bed, this wall at the Rainbo Bakery, you are supposed to cover the L.&M. before it gets a film over it; isn't that correct? A. That's right. Otherwise you get no bond.

Q. Otherwise you get no bond? A. Right.

Q. So wouldn't you agree with me, then, that you have to only put on as much L.&M. as you think you can cover before it gets the film, correct? A. That's right, yes, sir.

Q. Now, when you start a job, say a ten-story office building, you can know before you go on the job whether you are going to send your men in, put the mortar coat on the wall throughout the building or as much of the building as is completed, [550] and then come back and start your tile later, can't you? A. Yes, sir.

Q. Do you ever do that, float out two or three floors and then come back and start laying tile? A. Yes, sir, maybe not two or three floors, maybe one floor.

Q. As much as you can get done? A. That's right.

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Redirect Examination

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[551] Q. No difference. Now, how thick is your setting bed normally? A. A setting bed normally depends on the size and type of tile that you are using.

Q. What would be the minimum? A. Approximately a half inch for a setting bed or a float coat.

Q. Could it be an eighth of an inch? A. It could be. In some places it is. It depends on the trueness of the wall, the surface, that you are installing it on. The wall may be out of plumb a half an inch. You have [552] got to skim it tight in the bottom, plumb it out at top.

Well, naturally if you are tight there you have more up there.

ADOLPH N. MARTINI

was called as a witness by and on behalf of the Tile Setters and, having been first duly sworn, was examined and testified as follows:

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Direct Examination

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[553] Q. Are you a member of the Tile, Terrazzo and Marble Contractors of Houston? A. Yes.

Q. Are you a member of the Tile Contractors Association of America, Incorporated? A. Yes.

Q. Are you bound by the National Joint Board in your contract with the general contractor in any of your agreements? A. No.

Q. Are you bound by the National Joint Board in your association with the Tile Contractors of America? A. No.

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[554] Q. Do you have a collective bargaining agreement with the B.M.&P.I.U., Local 20 and Local 108, the Helpers? A. Yes.

Miss Thacker: Would you mark this for identification, please?

(The document above-referred to was marked Texas State's Exhibit No. 13 for identification.)

Mr. Capuano: What is this, T-13?

Hearing Officer: Right.

Q. (By Miss Thacker) What is this, Mr. Martini? A. That is the agreement by and between the Tile, Terrazzo and Marble Contractors of Houston, Texas, and the Bricklayers, Masons and Plasterers International Union

of America, Local Union 20 of Houston, Texas, representing tile setters, terrazzo workers and marble setters.

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[556] Q. What per cent of your total work is done where you install the mortar setting bed using tile setters? A. Oh, I would say possibly around thirty per cent.

Q. Then in case the tile setters should lose the float coat would you lose thirty per cent of your business? A. Yes, I would say so.

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[563] Q. (By Miss Thacker) Now, Mr. Martini, are you familiar with the setting bed or the float coat to receive tile? A. Yes.

Q. How thick is the setting bed or float coat, generally? A. Oh, it's on an average of a half inch thick. It can be more or less.

Q. How thick—well, let's see, you are familiar with the bonding agents which are applied to the float coat or setting bed for the tile laying. A. Yes.

Q. How thick is the bonding agent, generally? A. It's generally about an eighth of an inch.

Q. Has the introduction of the bonding agents brought about technological changes in tile setting? A. Oh, yes.

Q. What are some of these? A. Well, it's enabled us to install tile in areas that we didn't install it before, such as on sheetrock and diferent [564] materials of that sort, concrete blocks, that we can apply direct to the block or the sheetrock.

Q. Has it had any significant change in the process of tile laying, itself? A. Well, I will say it has in this manner, that when you work against a sheetrock wall or a concrete block wall, or wall prepared by others, you have to work to the surfaces that they give you to work on, and sometimes these surfaces are not always accurate, true, plumb or straight, but if it's generally accepted by the owner or architect, we call their attention

to it, they will permit us to put our material upon those walls by the thin-set method, and we always try to clear it with them first so we won't have to tear it out.

Q. Now, have you ever employed lathers or plasterers and had them on your payroll? A. Yes, we have on occasion.

Q. Have you ever had a plasterer to put in your float coat or setting bed without direct supervision of a tile setter? A. No, I haven't.

Q. Have you seen plasterers work on installing the coat of plaster which is specified to be their work under the 1917 agreement? A. Let's see, I believe under the 1917 agreement it calls for a scratch and brown coat and we have installed out work over their scratch and brown in the conventional method.

[565] Q. Have you watched plasterers actually work at their craft? A. Oh, yes.

Q. Frequently? A. Well, of course, when I was working on the job I used to see them quite often, I was with them every day, practically.

Q. In your opinion do they have the requisite, by they I mean the plasterers, have the requisite skills to install a setting bed or float coat? A. Very few of them do.

Q. Could you guarantee your work as a tile contractor if the plasterer puts in the setting bed or float coat? A. No, I wouldn't, unless that float coat is absolutely perfect.

Q. Now, if you were forced to hire plasterers to put in your float coat or setting bed would it have any effect on your contract with the tile setters and tile helpers? A. Yes, it would.

Q. What effect would that be? A. Well, it would be contrary to our agreement.

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[567] Q. Now, are there any particular advantages in the one coat float coat method over the conventional method? A. Well, your one coat float coat method is actually the same as your conventional method when you

take the, when you start from the surface out, whether it's a scratch and brown coat behind it or remodeling job. Actually the one float coat method is more practical on remodeling work.

Q. Is it cheaper? A. Yes.

Q. Why? A. Because you can cover more ground with a one coat where you can float our setting bed out, like one day, and install the tile the next day.

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[568] Q. What is T-14? A. T-14 is the Plasterers Local No. 79, that is the agreement between the Contractors Lathing and Plastering Association of Houston, Texas and O.P.C.M.I.A. of Houston, Texas, Local No. 79.

Q. What is the rate of the plasterer foreman, hourly rate, effective July 1, '66? A. It will be $4.77 one-half.

Q. What is the hourly rate of the plasterer journeyman from July 1, '66? A. $4.52 one-half.

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[571] Q. Do you have a preference of work assignment to any one craft for the installation of the float coat or setting bed? A. Yes.

Q. Could you give me some reasons, please? A. Well, I prefer tile setters to do it because it's their work. I mean, they are more qualified and have been trained to do that specific type of work.

Q. Do you consider, in your opinion, is their skill superior to any other craft? A. Yes, in installing their own work, I say yes, in tile work.

Q. Would it make any difference to you economically if there are more than one craft on a job installation? A. Oh, it definitely would.

Q. Do you have or would you have better control of the [572] quality of the work over a craft with whom you have a collective bargaining agreement than one with whom you do not have? A. Yes.

Q. Would you tell us exactly what the job was that you did at Rainbo Baking which was picketed by Plasterers

Local 79? A. Yes, that is a remodel job and Rainbo Baking people elected to install some tile wainscot on their walls, I mean, tile walls in their baking room there. And we had to take, we had to install our work on some painted brick out there that was in place, and rather than to chop the paint off we elected to put metal lath on the brick work and nail it up there with concrete nails and install our setting bed and then install our tile on that with a bond coat.

Q. Now, are you familiar with various advertisements for manufacturers of bonding agents? A. Yes.

Q. In these advertisements they sometimes refer to their product as a "bed". In the tile industry can the application of the bonding agent in any way be considered a setting bed as you have thought of it historically or traditionally? A. Well, I wouldn't consider it a setting bed. Now, some of the manufacturers do call it a setting bed. That is just their terminology in their advertisements. I can't speak for them, as I would consider it strictly a bond coat.

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[575] Cross Examination

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[579] Q. (By Mr. Capuano) Now, Mr. Martini, you say you have been in business since 1934? A. That's right.

Q. And you were a tile setter for how long prior to that? A. Let's see, '24, I served three years apprenticeship, so about seven years as a tile setter.

Q. Seven years as a tile setter going back to 1927? A. '27, I think, is when I got my card because I started working in the business in 1924.

Q. O.K. [580] A. And I worked as a helper and then an apprentice, worked my way up.

Q. All right, sir.

So you have got approximately forty years in the business, then, haven't you? A. That's right.

Q. Now, you said you were a member of the Texas Terrazzo and Tile Contractors of Houston. Is that the name of it or is it the Tile and Terrazzo Contractors? What is the name? A. No, it's the Houston Tile, Terrazzo and Marble Contractors Association.

Q. Houston Tile, Terrazzo and Marble Contractors Association. Of Houston? A. Yes, sir.

Q. O.K.

Now, what other associations do you belong to? A. Oh, I belong to the Texas Tile Contractors Association.

Q. What is the exact name of that, now? A. Texas Ceramic Tile Contractors Association.

Q. All right. A. And the Texas Terrazzo Association.

Q. Texas Terrazzo. A. And the National Tile Contractors Association of America.

Q. Is that called the Tile Contractors of America, is that— [581] A. Incorporated.

Q. Is it called National Tile Contractors or just Tile Contractors of America? A. No, it's called the National Tile Contractors Association of America.

Q. I think it's called Tile Contractors of America, Tile Contractors Association, isn't it? A. Yes, I am sorry, I am in error there, it's Tile Contractors Association of America. I knew it was a national organization. I don't know what made me put that in there.

Q. O.K. Any others that you belong to?

All right. A. Well, if you want other trade associations, I am a member of the Producers Council.

Q. No. A. And the C.S.I.

Q. That's right, I think you have given me enough. A. That is all that I can think of.

Q. Now, do you hold any office in the Houston Tile, Terrazzo and Marble Contractors? A. Yes, sir, I am president.

Q. You are president? A. Yes, sir.

Q. And when did you become president? A. Oh, I have been president for over ten years.

[582] Q. For over ten years.

And, let's see, did you hold any office prior to being president? A. No, that is when we formed, I think.

Q. How about this Texas Ceramic Tile Contractors Association, do you hold any office in that? A. Yes, I am vice president.

Q. Prior to that did you hold any office? Oh, let me ask you this first. How long have you been vice president? A. I have been vice president for two years. This is going on the second year now.

Q. Two years.

How about did you hold any office before vice president? A. No, I have been on the Board of Directors.

Q. What is the Board of Directors? A. We are still speaking of the Texas Ceramic Tile?

Q. Yes. What is that? A. You mean you don't know—

Q. I mean what do they do, do they set policy or something? A. You don't know what the Board of Directors is?

Q. Well, would you tell me— A. Yes, for the information, the Board of Directors do set the policies. They are elected by the membership to set policies and determine various questions that come up without going to the membership first, and they bring it up [583] later to be determined by them, to be approved or disapproved.

Q. Pardon me? A. I say they bring these things up, recommendations to the membership later to be approved or disapproved.

Q. And when were you on the Board of Directors? A. Oh, I have been on it, I have been on it a couple of times. I don't remember just exactly what year. It's been within the last five years.

Q. I want to become acquainted with you, you see. I am trying to get your background here. A. Fine.

Q. Do you know if Texas State Tile and Marble Company is a member of these two associations, too, the Houston and the state? A. Yes, sir.

Q. What does that state association take in, the whole State of Texas, is that the idea, of tile contractors? A. That's right.

Q. Now, how about the Tile Contractors Association of America? A. Well, that is a national organization.

Q. Right, made up of tile contractors? A. Of tile contractors from all over the country.

Q. And do you hold any office in that? A. Not at present.

[584] Q. You have held one in the past or some in the past? A. Yes, I have been on the Board of Directors.

Q. When was that? A. Oh, let's see, about two years ago I got off of the Board, so that was in '57. I would say around in '56.

Q. '56? Did you say '56? A. I am sorry, '66. However, I was on in '56 also. I have been on the Board several times.

Q. Oh, you have? When was the first time, '56? A. Oh, it was back in the '50s. I don't remember the exact date. But just recently, it was two years ago, that I got off the Board. That is when my term expired.

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[588] Q. (By Mr. Capuano) Now, you testified that thirty per cent of your work is installing tile in a mortar setting bed, is that right? [589] A. That's right, around thirty per cent.

Q. And you said that if the tile setters lost this work you would lose thirty per cent of your business? A. Well, we would lose all of it, of that particular, we would lose that thirty per cent.

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[594] Q. Now, you say these bonding agents first started coming out in 19, the early 1950's? A. I would say the early '50s.

Q. Yes. All right. A. Let's put it that way.

Q. Now, you gave us two advantages of having these bonding agents. Can you think of any more? You said

you could install it over block or sheetrock. A. Well, it gives us our, it gives our tile setter more working time, I mean, where the material doesn't set up as fast as when we just used to use the Portland cement, and sometimes Portland cement—

Q. You mean as a setting bed? A. No, as a bonding agent. See, the Portland cement used [595] to dry up on you real fast at different times, depending on the wall behind it, the suction, and temperature, in the areas that you work in. If you have a lot of wind blowing over the surface it dries out too fast. Where your thin-set bonding agents will give you more time where you can work your tile much better. It gives you, just gives you a greater flexibility.

Q. All right.

Wouldn't one of the advantages be that you do not have to soak your tile? A. Well, yes, it is an advantage that you don't have to soak the tile.

Q. You used to soak your tile in the conventional method? A. That's right, that's right.

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[600] Q. O.K. That is what I am looking for.

Now, I show you Exhibit T-6, the specifications on the Anderson Library. Now, I know this isn't your job. A. Yeah, that's right.

Q. Look at page 15-2 under 15-6, laying tile, sub-paragraph (a).

Wait a minute. Yes, sub-paragraph (a).

Read that to yourself. A. (Witness complied.)

All right, sir.

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[602] Q. That's right, you reinforced yours with lath.

Now, would you say under this specification that it would permit letting the tile sit for several days and coming back and applying it later with L.&M. or some other material? A. No, not the way this specification reads.

Q. Because it provides that the area must be covered with tile before the mortar has reached its initial set, doesn't it? A. That's right.

Q. That would be a typical conventional installation, wouldn't it? A. No, I couldn't agree with you on that point because the typical conventional method you can cover it or not cover it the same day. That is the way we always do our work.

Q. That is the way you have always done your work? A. Yes, sir.

Q. Are you saying that perhaps if you got a little area left over you would come back in the morning to finish it? A. That's right.

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[606] Q. Now, when you were installing tile back in the '30s and '40s in the conventional method, you would not put a setting bed over a whole lot like the wall in the Rainbo Bakery, knowing that you did not have the tile, and you didn't have any idea when you were going to get it, would you? A. No. We could and we have done it where we were required to by conditions on the job. We had to get in there with our mortar coats and get out of there so we wouldn't interfere with the operations of bread-making there, and they wanted us to get through with our Portland cement mortar, get it out of the building. They didn't want to be bothered with dust and dirt.

And even in years past I have done that same thing that I am telling you I am doing right now, that I have covered up what we put with the conventional method and then come back later and finished our walls above and buttered our tile up, skim-coated that wall and done it many a time.

[607] Q. All right. I don't want to keep on this. Are you telling me that that was a typical installation for you, a typical installation, one you did every day of the

week as a tile contractor? A. Well, no, back in the old days I don't say it was a typical installation.

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[608] Q. (By Mr. Capuano) Mr. Martini, I show you Plasterers' Exhibit 14 and ask you if you can identify that. A. Yes, sir, that is the installation manual of the L.&M. system.

Q. And on this job I believe Mr. Colvin testified you used the L.&M. concentrate. A. That's right.

Q. And that is the dry mixture that you pour into your Portland cement. A. That's right.

Q. And much of this concentrate would you use to a bag of Portland cement? A. I think you use one bag, one box of concentrate to one bag of cement, normally.

Q. And your bag of cement is what, ninety-four pounds? A. Ninety-four pounds, yes, sir.

Q. And your bag or box of concentrate would be how many pounds? A. Oh, I don't remember the exact weight. It would be around twenty to twenty-five pounds.

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[609] Q. Now, you could add sand to that, couldn't you? A. You could.

Q. If you want to make it a little thicker? A. Well, it depends on the way you use it if it's necessary to add sand to it.

Q. But you could. A. Oh, yes, yes.

Q. Have you ever added sand to it? A. Sometimes.

Q. Does L.&M. make a mixture that already has sand in it, too? A. Yes.

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[612] Q. In fact, that is the association that developed thin-set mortars, isn't it? A. Well, let's put it this way, they took it up after Bill Love and Charlie Montgomery.

Q. Oh, Bill Love and Charlie Montgomery were really the first to— A. Well, they were the inventors of it.

Q. They were the inventors of it? A. That is where the L.&M. comes from.

Q. That's right. And then the Tile Council of America picked it up? A. That's right.

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[613] Q. (By Mr. Capuano) I am going to show you Plasterers' 15 and ask you if you can identify that? A. Yes, it's the Highlights of Tile Technical Progress.

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[617] Mr. Capuano: On page, sorry, page six. Just below the section or in the section where it says Still More Advantages. I am asking him to read the last sentence.

Q. (By Mr. Capuano) Would you read that out loud, please? A. It says "Dry-set can cut the weight of the tile bed to one-eighth of a conventional installation, and a job that might take nine days by the old method can be done in two days."

Q. All right.

Now, when they are referring there to the tile bed in the conventional installation, what coat of mortar were they talking about or are they talking about? [618] A. Well, they are talking about the L.&M. bond coat there.

Q. When they are talking about the tile bed— A. When they say dry-set that is what it means there.

Q. Dry-set means L.&M. in that material can cut the weight of a tile bed to one-eighth of a conventional installation.

Now, aren't they stating there that a bed of L.&M., or call it, if you want, a bonding agent, weighs approximately one-eighth of putting on a regular half-inch, up to three-quarter inch, tile setting bed in the conventional method. A. No, it weighs less. There is no doubt about that.

Q. Isn't that what they are saying? A. Yes, it's got to weigh less. An eighth of an inch of mortar can't weigh as much as a half inch of mortar.

Q. And they are comparing it to a regular bed in the conventional method, aren't they, the dry-set mortars as

compared to the conventional bed? A. Well, the way this reads, evidently that is the way they are comparing it, but I still can't agree with them.

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Q. Now, Mr. Martini, maybe I can refresh your recollection a little bit. Weren't you on the Board of Directors of the Texas Ceramic Tile Contractors Association in 1961 and '62? A. I don't remember the exact year, to be honest. There [619] have been several years since I have been.

Q. It was around that time, wasn't it? A. Well, it could have been in the late '50s.

Q. You say you have been on it several times? A. Oh, I have been on it a couple of times, yes.

Q. So one of the times could have been around 1961 or '62, couldn't it? A. Well, possibly. I don't know. Without checking, I couldn't answer your question.

Q. And you would be the representative for the southeastern area of the State of Texas, wouldn't you? A. That's right.

Q. Do you know Mr. Bill B. McHarg? A. Oh, yes.

Q. Who is he? A. He is a tile and marble contractor in Fort Worth, Texas.

Q. Has he ever held any position in the Texas Ceramic Tile Contractors Association? A. Yes, he was president at one time.

Q. Who is president now? A. Mr. Sam Villa, V-i-l-l-a, from San Antonio.

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[620] Q. (By Mr. Capuano) Who was president before Mr. McHarg? Does Mr. Bernard ring a bell? A. Yeah, George Bernard.

Q. Right.

Now, Mr. Montgomery is a tile contractor, isn't he? A. Yes.

Q. Charlie Montgomery? A. Yes.

Q. Where is he, in Waco? A. Waco.

Q. What is it, United Tile? A. Yes.

[621] What does Mr. Love do, is he a contractor? A. No, Mr. Love is with L.&M.

Q. He is running L.&M. and Mr. Montgomery is a tile contractor. A. That's right.

Q. Do you know if Mr. Montgomery is a member of the Texas Ceramic Tile Contractors Association? A. He was at one time. I don't know if he is still a member or not.

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[640] Q. Now, looking at T-7, your specifications for the Rainbo Bakery job— A. Yes, sir.

Q. —is that dated? A. No.

Q. When was it prepared? A. Oh, it was prepared—

Q. That paper in front of you. [641] A. Yes, sir.

Q. When was it prepared? A. Oh, that paper was prepared several weeks ago.

Q. How many weeks ago? A. Oh, I don't know, two or three, I guess.

Q. For this hearing? A. Yes. Those are my specifications.

Q. I understand that. A. Yeah. And that is the way that we have installed it on several other occasions for a period of several years on the job, and all I was doing is clarifying the method of installation there.

Q. You prepared them for this hearing? A. Right.

Q. Now, you said that the tile layers have lower wage rates than the plasterers, they don't have any fringe benefits, the tile helpers don't have any fringe benefits. A. That's right.

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[642] Q. All right. The tile setter rates are lower than the plasterer? A. Than the plasterer mortar mixer.

Q. I am talking about the journeymen now, your journeymen. A. Oh, yes.

Q. Your tile layers are lower than the plasterer journeymen? A. Oh, yes, yes, sir.

Q. And your tile layers don't have any fringe benefits, you said? A. That's right.

Q. So that means that you have got lower wages that you have to pay for their work, isn't it? A. Right, lower than if I had to hire a plasterer.

Q. Right, and you like that, don't you? A. Well, anybody does in business, especially when you have to meet competition like you do today.

Q. So that would influence your opinion on who you would like to see do this work, wouldn't it? A. Wouldn't you?

[643] Q. I will ask the questions. You answer them. Correct? A. No, I wouldn't say it would because I feel that the tile man is more qualified to do it, and if we can do a little bit better job of bargaining than the other man can, that is up to us.

Q. So then just so the Board can understand your testimony, now, the fact that the plasterer has higher wage rates than the tile setter does not enter into your decision as to who you should assign this work to, correct? You are more interested in the skills— A. Well, we are more interested in the skill. Of course, we are interested in cost and in a way it could have a bearing on it.

Q. Well, now, you tell me, does it or doesn't it have a bearing on it? A. If it's going to cost, if it's going to cost me more to do my work with plasterers than it will with tile setters, naturally I am going to take the tile setters.

Q. Right. And you are going to favor the tile setters for that reason, aren't you? A. Certainly.

Q. So that does have a substantial bearing on your opinion as to who you should assign this work to, correct? A. It has some bearing, not all of it.

[644] Q. Well, I want to find out how much. A. Well, I don't know.

Q. Are you saying it doesn't make any difference or it does make a difference, it's a big difference or it's a lot of difference? A. Well, it could make a big difference if

it's a big job. Q. All right. So it is a substantial part of your opinion, right, or it isn't? I mean, tell me. A. Well, it is, yes.

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[645] Q. O.K. Haven't you also testified that Mr. Longshore [646] even asked you to sign an agreement with him, didn't he? A. Sure.

Q. So he was willing to bargain with you, too, wasn't he? A. That's right. You can't blame him for trying.

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[647] Q. You did hear my question, didn't you?

All right, let me ask you another one. If someone else, another craft, another contractor, is going into a room, he is going to put up the walls, whether they be sheetrock, Portland cement mortar, any material, at all, then you are going to come along and put your tile on it with L.&M., Crest or one of these other products, there is nothing unfeasible about that, is there? A. Oh, its being done.

Q. There is nothing unfeasible about it to use your word, is there? You do it? A. Oh, yes, we have done it.

Q. And you do it quite often, don't you? A. On qualifications.

Q. You do it quite often, don't you? A. Oh, yes.

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[658] Recross Examination

Q. (By Mr. Capuano) You said that Mr. McHarg is a member of the Tile Contractors of America and that you have an agreement with him, is that right? The Tile Contractors of America have an agreement with the B.M. P.I.U.? A. That's right.

Q. And you said that that sets forth or stipulates that it's the tile setter's work of putting up the mortar coat? A. Yes, I think it's stipulated in the agreement what the duties of a tile setter are, in the National Agreement.

[659] Q. Yes. How long have the tile setters been entitled to this work under the National Agreement of the Tile Contractors of America? A. Well, it's hard for me to tell. It's been for many, many years.

Q. How long, ten years? A. Oh, I wouldn't guess at that because it would just be strictly a guess and I wouldn't want to do that.

Q. More than ten years? Less than ten years? A. Oh, it's been more than ten years, I know that.

Q. More than ten years.

So at the time these guide specifications were drafted in 1961 the members of the Texas Ceramic Tile Contractors Association should have known that their agreement with the B.M. P.I.U. allegedly assigned some of this work in the specifications to tile layers, shouldn't they? A. Well, I may be able to clarify that for you to some extent. Frankly I am not familiar with this until it came out. I didn't know anything about it. They were having some meetings with the plasterers, the boys up in Dallas and Fort Worth area, of the Texas Ceramic Tile Contractors Association. And all we got was a printed copy of it when it was all over. And frankly I never did approve it personally, and I don't know as it's ever been approved by the National Tile Contractors Association.

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[660] G. ZAMBON

recalled as a witness by and on behalf of the Tile Setters, [661] having been previously sworn, was examined and testified further as follows:

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Direct Examination

Q. (By Miss Thacker) Mr. Zambon, how long have you been in business as a tile contractor? A. As a tile contractor since 1947.

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[662] Q. Are you bound by the National Joint Board in any of your contracts with the general contractor? A. No.

Q. Would you voluntarily bind yourself to the National Joint Board decisions? A. No.

Q. Is there a clause in your local agreement binding you to the National Joint Board? A. Absolutely not.

Q. Is there one in the National Agreement binding you to the Joint Board? A. No.

Q. Do you have a collective bargaining agreement with any other craft than the Tile Setters? A. No.

Q. Of the total work that you do, say in 1966, what per cent of that work did you install the mortar setting bed in which you used tile setters?

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[663] A. I would say in 1966 probably was about forty percent that we float, ourselves.

Q. (By Miss Thacker) So then if the tile setter does not have a right to do that work you would not be doing it either, is that correct? A. That's correct.

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[664] Q. Generally speaking, on the average, what is the thickness of your setting bed or your float coat, though there may be variations, but what does it vary from? A. Well, say it would be around a half inch but sometimes it might be one inch and in some places a quarter of an inch.

Q. Could it be an eighth or three sixteenths? A. Not solid through. In some areas just to straighten the walls out it might be that, you might be able to put one-eighth.

Q. Since you have been in the business and before, when you worked as a tile setter, has there been any change in the setting bed or the float coat, itself? A. Absolutely none.

Q. Where are the technological changes, then? A. The technological changes, the only thing I see the difference, before we were smearing the cement, the pure cement,

on our float coat, and now we have this new matter that is a retarder, it's called thin-set method, which you smear to give you more time to set your tile, and you don't have to soak it, you can also set it while it's dry.

Mr. Capuana: While it what?

The Witness: While the wall is dry.

Q. (By Miss Thacker) So that you know of no changes in the setting bed, itself. [665] A. None.

Q. There are advertisements put out by manufacturers for bonding agents that refer to their product as a "bed". Do you feel it can be called a setting bed in any way, this bonding agent? A. Absolutely not because when we put tile in the conventional way we put cement on the wall, too. What do you call that? Another coat there to bond our tile.

Q. Can you get the same job done on the application of the bonding agent that you do when you apply the float coat to your wall? A. If I—

Q. Can you plumb, rod and square it and do all of the same things that you do to your float coat, can you do that with the bonding agent when you put it on, on the wall? A. No.

Q. Why can't you? A. Well, because on the bonding agent it's just something to bond the material. You follow the contour of the wall or ceiling or whatever it is. You cannot straighten out, you just follow the way it is. But the float coat, that is the one that counts. You put it real straight and then this material you smear on the wall with a notched trowel or whatever you want to smear it with. And you put your tile, you install your tile on it. But it's got to be straight [666] before you put it on unless you can go around in a curve.

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Q. Of the two crafts which craft do you consider to have the superior skill in the application of the float coat, as the tile setter calls it, or a coat of plaster material, as the plasterer calls it? [667] A. If it is for to in-

stall ceramic tile, naturally the tile setter would be a lot more qualified because he is working every day in tile. He knows more precisely how that wall should be floated.

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Q. Now, in the total installation how would you allocate the time as to the floating and of the actual tile setting? A. How long it take me to float compared to setting the tile?

Q. Yes. Yes. A. I would say sixty per cent to do the floating.

Q. Where does the real art of the craft lie? A. The craft lies particularly when you have units, like if you have a door jamb, soffits for swimming pools, and a lot of complicated things which for a man, if he is not continually in the trade, they will be almost impossible for him to do.

Q. Have you had pobs where you have had plasterers on the pob to put on a coat of mortar? Have they been on your payroll? [668] A. I believe I have one time just to help, to fill in, in the Tennessee Gas Building. I don't remember how long. A very short time. That's the only time in my life.

Q. Did they work under direct supervision? A. Yes, sir.

Q. Of a tile setter? A. Just what you call browning or roughing, no finish for our tile.

Q. Oh. You mean they were doing their regular brown coat? A. Yes.

Q. Then they were not doing any work in controversy here? A. No, absolutely not.

Q. Do you have a preference of work assignment to the two crafts? A. Absolutely, yes.

Q. Which one? A. To the tile setters.

Q. Is this solely because you have a collective bargaining agreement with them? A. No, no. As I said before, he has to be trained and it takes many years before he is able to do it.

Q. Does the fact that his, and by his I mean the tile setter, the fact that his rate is lower and he has no fringe benefits, is that a controlling factor? A. Not to me, no. [669] Q. Would you tell us exactly what your job was at the Anderson Library? A. I will be glad to. On the Anderson Library, as a rule, whenever we go on a job if it is for the plasterer to scratch and brown, square and plumb, whatever is to be done, we are happy to see them. If they wanted to do it and it calls like that, it's fine. But on this particular case it was not in my specifications, and I don't remember if it was in the plasterers', where he is supposed to put this brown coat, whatever you call it.

So when we went to the job we apply what we call one coat. The plasterer did scratch the metal lath, and we put our float coat in one time, and we installed the tile later.

Q. Was there— A. We squared and plumbed it and —beg your pardon?

Q. Was there room for another coat for the plasterer to apply? A. In some areas not. Some there probably was.

Q. Then he put in the, the plasterer put in a preliminary rod, squaring and plumbing of the wall, is that correct? A. No, he just scratch over, put the one scratch coat over metal lath, and that is all.

Q. That is all. Did he do a preliminary rod, square and plumb? A. No. He didn't do it because he wasn't called on this [670] particular job.

Q. Now, did you have quarry tile and ceramic tile in this job? A. Yes, ma'am.

Q. Where was the quarry tile? A. The quarry tile were in the stairwells.

Q. That was over metal lath, wasn't it? A. Part were metal lath and part were either structural tile or brick, concrete blocks.

Q. Could you put your tile on the same day that you floated it in that case, quarry tile? A. No, it's too difficult.

Q. Why? A. Well, because quarry tile, they are too heavy.

Q. What would happen? A. It happen if it is in an area you don't have enough thickness, when you start your tile it's got a tendency if you hit too hard, it will loosen the bond, and when it's too soft it will sag, come down.

Q. Fall off the wall? A. Fall off, that's right.

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[671] Q. Now, is it easier to have only one craft on the job or is it just the same if you have more than one on the job? Does it make any difference? A. Well, it makes a lot of difference. It's a lot easier if you have one craft on the job which you can send them in there, install your wall, floors, ceilings, whatever you have, without having two crafts.

Q. Do the plasterers normally have access to the tile and the lay-out of the room that you are going to make at the time that they put up their brown coat? A. No, ma'am, no, they might have access to the specifications, but that don't help them.

Q. Are the specifications that the general contractor has in his office sufficient for the plasterer to know exactly what your tile installation is going to be so that he can make his wall to conform to your specifications? A. Even myself, that I work all my life, I won't know unless I have the tile on the job. I will not be able to give any dimensions whatsoever.

Q. Why isn't it possible? A. Because usually when we are doing a job, we go on a job, [672] ourselves, the plasterer has already, whatever he call it, put the brown coat on it, so when we get there we have to proceed with what we have, whether it's good, bad, or whatever, we just have to follow.

Q. Well, my question is why is that without the tile you cannot lay out the wall properly or float the wall properly? Why is it necessary to have the tile in order

to do that? A. It is necessary because each manufacturer have different size of tile. We are speaking about, say, if it calls, say, four and a quarter by eight and a half, well, it's not four and a quarter, some manufacturers it's four and three sixteenths, four and three-eighths, or over. Same thing in two-by-two tile, it might be two and one-eighth instead of two inches. Well, when you are speaking of when you have a jamb or columns where you come out where it specify in many cases that the union must be full, if you have got in particular one-by-one tile, unless you have start the job, instead of one inch it's one inch and one-sixteenth, you cannot lay the tile unless you have the tile on the job, that is impossible.

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[673] Cross Examination

Q. (By Mr. Capuano) I was interested, Mr. Martini—
Miss Thacker: This is Mr. Zambon.
Mr. Capuano: I am sorry. Mrs. Zambon.

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[675] Q. O.K.

Now, on this Anderson Library you received a copy of the Joint Board award in this case, didn't you? A. Yes.

[676] Q. That was the November 11 one and the— A. I got them all.

Q. You got them all? A. Yes.

Q. So we know what we are talking about, let's just get the exhibit numbers. P-3 and T-8. You got copies of both those? A. Right.

Q. And they referred to the Southwestern Construction Company, contractors, Texas State Tile and Terrazo Company, sub-contractor, and the Science Building as the job. A. Right.

Q. Now, that wasn't the job they were talking about, was it? A. No.

Q. It was the library job, wasn't it? A. Right.

Q. You understood that, didn't you? A. Right.

Q. And you sent a telegram to the Board, in fact, telling them this. A. That's right.

Q. But they kept calling it the Science Building, didn't they? A. Yes.

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[678] Q. Now, I would like to clear up a little bit the actual work that has been done on this job.

Now, let's stick with the bathroom first. What did you have, maybe two bathrooms on each floor? A. Yeah.

Q. And they were sort of large bathrooms, weren't they? A. Correct.

Q And you had ceramic tile, what, glazed ceramic tile in there? A. Four and a quarter on the walls and two-by-two on the floors.

Q. All right.

And out in the stairwells, you had two stairwells? A. Four stairwells.

Q. Four stairwells. O.K. You have quarry tile out there? A. Right.

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[683] Q. No. You put your coat on the wall and you let it dry, right, the mortar coat? A. Yeah.

Q. Then you say the next day you come back and put the tile on? A. Right.

Q. Well, was there ever a lapse logner than one day before you put the tile on the float coat? A. Not in the bathrooms, I don't think so.

Q. Not in the bathrooms. You did that in one day? A. Yeah.

Q. All right.

So then the next day you came back and you used this mixture of Portland cement, water and what else? A. And some concentrate made by Kaiser.

Q. Made by Kaiser. Do you know what it's called? A. It's concentrate, Kaiser is the manufacturer that makes it.

Q. Is it a liquid concentrate or powdered concentrate? A. Powder.

Q. Is it a Crest concentrate? A. That's right, it's Crest.

Q. And is that similar to the L.&M. concentrate we just discussed here? A. Yes, similar.

[684] Q. And did you have to mix about twenty-five pounds of that with each bag of Portland cement? A. Yes.

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[685] Q. Well, all right, twenty percent.

Did you try using just neat cement to put that on the wall, put the tile on the wall? A. Well, using the neat cement it was drying too fast. I was afraid it was not making a good bond. Since this thing come out we found it's a good thing to keep nice and soft so we can put on tile without water. We know it will bond.

Q. The neat cement was drying too fast? A. If you put just neat cement without this retarder of concentrate it will dry up too fast, it won't bond your tile.

Q What is that? A. Why is that?

Q. Yeah, why would it dry too fast? A. Because the wall was too dry.

Q. You mean because it was a day old, you mean? A. Yes. Well, even the same day, where you have got a small amount, it would be too dry.

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[686] Q. Wallboard, gypsum plaster? A. Right.

Q. Have you put any right over concrete block yet, or brick? A. I don't remember. Concrete block, I don't think I go for it, but probably I will if I have to do it.

Q. How about brick? A. No, not on brick.

Q. How about right on a concrete wall, have you ever done that? A. I think we have one job on concrete wall, yes.

Q. One job? A. Yes.

Q. You said you were a member of the Tile Layers, didn't you, the union? A. Yes.

Q. When you install tile right over gypsum plaster do you know if the tile layers claim the installation of the gypsum plaster coat? A. No, if it's gypsum plaster we do not claim it. That is not ours.

Q. They don't claim it? A. No.

Q. And you don't claim the installation of the sheetrock, either? [687] A. No, but we don't guarantee it, either, because I am working now—

Q. Yeah, I understand your guarantee. I understand your guarantee.

When you put it over gypsum plaster, you know, like we just talked about, say not a white coat gypsum plaster, just the brown— A. Just the brown, yes.

Q. —what would be the setting bed there? A. There will be no setting bed.

Q. You wouldn't have any setting bed? A. No. That one there would be considered the setting bed, that one there.

Q. What do you mean that one there? A. Or I might have to put it up with some organic adhesive in there.

Q. You pointed your head, now, and the record didn't get that. What are you talking about? You said that one there might be the setting bed. What do you mean? A. Well, the brown coat as you call it, that one there will be a backing, something to put, it's got to be a surface that we have to put the tile on.

Q. Uh-huh. A. That will be serving as part of the wall, I guess, that one there.

[688] Q. Would you say that would be the setting bed, then, when you put it over gypsum brown coat? A. Well, whether it's bad or good, I call that the setting bed, yes.

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[689] Q. Let me see if I can understand you, then.

If the plasterer put up the mortar coat on the wall of Portland, say in those bathrooms at Anderson Library— let me [690] put it this way first, you said that the mortar coat you put up on the wall was the setting bed,

right, or was the setting bed for your tile? A. That's right.

Q. Now, if the plasterer had that in his contract, he would put up that mortar coat, and you come back the next day and cover it with your Crest concentrate, what would you call the coat that the plasterer put up? A. I would call it just a bonding coat to stick the tile with.

Q. No, what would you—let me ask you this first. If the plasterer put the coat of mortar on the wall, what would be the purpose of that coat? A. The purpose of the coat is to be sure that the walls, when we apply this L.&M. material, thin-set, to be sure that the back is straight because the last part that you put this thin layer of L.&M. or Crest that you put, that one there serves just to bond the tile, but if the wall is not straight, if it goes like this (illustrating), you just follow the contour of the wall.

Q. Please, I wish you would just limit your answers to my questions. The purpose of the coat would be to straighten the wall, right, plumb the wall up? A. Correct.

Q. Now, when you went in there and you put that coat on the [691] wall, the mortar coat in the bathrooms, what was the purpose of the coat of mortar that you put on? A. The purpose is that I think we put it up better than they do, that's right.

Oh, now, please.

Mr. Capuano: Mr. Hearing Officer, I am going to have to ask that he respond to the questions. I keep getting all these voluntary statements about his position.

Q. (By Mr. Capuano) Now, I think my question was very clear to you. What is the purpose of the mortar coat that you put up on the wall in the bathrooms in the Anderson Library? A. The purpose was to receive tile.

Q. Did it have any other purpose? A. No.

Q. It didn't. A. The purpose was to put a nice plumb, straight and square wall, and then to install the tile the

next day with either—with the new methods we have, whether you call it L.&M. or Crest or whatever it was.

Q. All right.

So you plumbed and straightened, squared and rodded the wall with that coat, right? A. That's right.

Q. Now, I was glad to hear your testimony that as far as you are concerned the higher wage rate of the plasterers [692] doesn't enter into your— A. That is not a prime reason, no, not to me.

Q. Would you let me finish my question?

Doesn't enter into your prefeernce between hiring tile setters or plasterers, right? A. If I don't have any preference?

Q. No, wages don't make any difference. A. No.

Q. We can discount wages? A. Right.

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[695] Q. O.K.

Now, if when you were putting tile over sheetrock, your tile setter could put up the studding and sheetrock, make sure you had a nice straight wall, it would be easier for you to put on your tile, wouldn't it, get a good job, right? A. Yes.

Q. It would be nice and straight, wouldn't it? A. Yes.

Q. And then you could guarantee the work that your employees did, right? A. Uh-huh.

Q. But your employees don't put up the walls, do they? A. No, they don't.

Q. In the construction industry you have a lot of crafts doing various parts of a building, don't you? A. Right.

Q. And if we had only one craft it would be a lot simpler, wouldn't it? A. Well, naturally.

Q. There would be no jurisdictional disputes. A. Yes.

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[699] Q. If you put tile in a bathroom where there is a tub, is the tub installed before you get there? A. Yes.

Q. So when you are building your walls on either end of that tub you can't build your walls out so far that your mortar is [700] going to hand over inside the tub, can you? A. No.

Q. You have got to set back to the edge of the tub, right? A. You have got to make it cover the lip of the tub so the water won't leak.

Q. Right.

And you have got a little bit of room there to move but that is all, isn't that true? A. Well, you have got quite a bit. You have got a little play there.

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[702] Q. Are you telling me that you did not talk to the architect or the inspector to change the specifications? A. I did not talk to change it, no.

Q. All right.

But you did not install it in accordance with the specification, right? A. Because it was improper.

Q. I understand your reason. I understand. You just gave us that speech. A. O.K.

Q. But you did not do it according to specifications, right? A. No.

Q. Are you saying no, what I said was wrong, or no, you did not do it? A. No, I said that you are right, when I said no, I didn't do it.

Q. O.K.

Now, you are a member of the Texas Ceramic Tile Association [703] also, aren't you? A. Yes.

Q. And you have held some offices in that group, haven't you? A. Never did.

Q. Never did? A. No.

Q. Never been on the Board of Directors? A. Never did.

Q. Do you have a brother in your firm that has been on the Board of Directors? A. No.

Q. Would it refresh your recollection if I suggested that August of 1961 Mr. G. Zambon was on the Board of Directors from Southeast Texas Zone? A. If I was

they must have elected me without even knowing it because I attended one time that meeting there in San Antonio and never did go any more.

Q. Did you know they were using your name on their letterhead? A. They might, I don't know.

Q. You don't know? A. No, sir.

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[705] Q. (By Mr. Capuano) Just one question. Has the Plasterers Union ever told you they would not work for you? A. No.

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[710] ELZIE GOOD

was called as a witness by and on behalf of the Tile Setters and, having been first duly sworn, was examined and testified as follows:

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Direct Examination

Q. (By Miss Thacker) Mr. Good, are you a tile setter? A. Yes, ma'am.

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[716] Q. Now, Mr. Good, if you are going to do an expert job of tile setting, what is necessary? A. It's necessary to have a plumb and straight wall.

Q. Is the wall plumb and straight when the plasterers get through with it, generally?

Mr. Capuano: Oh, now, I am going to object to that question.

Miss Thacker: Well, now, the plasterers do, according to the agreement, a preliminary plumb. It says so in the agreement. It is preliminary. So I am asking him if they [717] are in effect following the agreement. They are not called on to get it completely.

Q. (By Miss Thacker) Is it preliminary. Is the job, Mr. Good, that the plasterers do in a conventional method or a one float coat method a finished job as to plumb, rodding and squaring? A. No.

Q. Then when you come onto the job in that sort of a tile installation, a conventional job or one float coat method, what do you do then? A. Well, I usually check the job out and get with the plasterer and try to get it patched up where it's wrong.

Q. Well, now, this is my question here, where you are doing a conventional method or a one float coat method that you are putting on the float coat— A. That I—

Q. That you are putting on. He has done a scratch coat and a brown coat. Now you have got the float coat to put on, yourself, and you come onto the job. He has done the brown coat and the scratch coat. Now, what do you do when you come on to put your float coat on? A. Well, I come in and plumb and square all my walls to float.

Q. Do you have the tile that you are going to put up? A. Yes, ma'am.

[718] Q. Is it necessary to have the tile that you are going to put up? A. Yes, ma'am, I believe it is.

Q. Why? A. Well, all the tiles are from different factories or different sizes, and if you are going to float a wall out to receive tile you have to have the tile there to know what size.

Q. Can you always put up tile the same day you float? A. Yes, ma'am.

Q. On a wet wall will quarry tile stay on a wet wall? A. Well, no, ma'am, not on a wet wall it won't.

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[721] Cross Examination

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[730] Now, you told me that, or I believe you told Miss Thacker, in the conventional method you have to know the size of the tile, is that right? A. You need to.

Q. Now, the size of the tile is no secret that only tile setters know, is it? A. No, it's not.

Q. Anybody can take a tile and measure it and know what size it is, that is right, can't they?

You are shaking your head yes? A. Yes.

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[734] BENNIE HAROLD MOORE

was called as a witness by and on behalf of the Tile Setters and, having been first duly sworn, was examined and testified as follows:

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Direct Examination

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[736] Q. Is it your understanding that the plasterers should scratch their coat? A. They should be scratched if we are going to put our float coat on it.

Q. Should it be scratched if you are going to do a thin-set? A. No, ma'am.

Q. Can you put on the bonding agent on a scratched surface? A. Well, I don't do—you can put it on but you can't get a proper job it it's just scratched. I mean, you would have waves.

Q. Do you have any way of controlling the bonding agents in [737] such a fashion that you could straighten up the wall with the bonding agent alone? A. No, ma'am. We are using the thin-set and usually it takes a long time to set, so if we try to straighten a wall up with it, it would roll right off the wall, right down the wall.

Q. In your bonding agent do you generally have different thicknesses, say, on a surface— A. Yes, ma'am.

Q. —would there be some place where it would be a 32nd and some where it might be a 16th. Does your bonding agent vary in thickness on a surface? A. Well, we use different notched trowels to install our bonding agent.

Q. But is there a variation of your bonding agent or is it generally the same thickness in your installation?

A. No, ma'am, it's not. Like I say, we use different notched trowels. We use an eighth-inch notch and then—

Q. So it's pretty uniform, then? A. Yes, we are supposed to put it uniform on the wall, yes, ma'am.

Q. So, then you are saying that you can't correct any inequalities in the surface through your bonding agent alone? A. No, ma'am, you sure can't.

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[738] Q. (By Miss Thacker) Now, Mr. Moore, can you put up successfully quarry tile on a wet setting bed? A. Well, I would think that you could. I mean, if I set it.

Q. On a wet setting bed?

Mr. Capuano: It's repetitive. He answered the question.

A. If, I mean, if your wall isn't too wet were it will slide, you could.

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[739] Q. Now, since you have been tile setting has there been any change in the setting bed, itself? A. No, ma'am, there hasn't other than the thin-set method, but there has actually been no change in your setting bed.

Q. No change in the setting bed? A. No, ma'am.

Q. What effect has the new bonding agents had on tile installation? [740] A. It sticks your tile to your setting bed.

Q. Does it have any other purpose, the bonding agent? A. No, ma'am, that is just about it, a bonding agent.

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Cross Examination

Q. (By Mr. Capuano) Mr. Moore—is that correct? A. Yes, sir.

Q. What did you mean you came in with two vouchers into the tile setters? A. Well, other than going through an apprenticeship, well, I was setting tile, I mean, I

wasn't setting but I was helping an uncle of mine, and I more or less picked up from him how to set tile, and I got two proper vouchers and got in the union.

Q. Was he a union contractor? A. No, sir, he was a union tile setter.

Q. He was a union tile setter? A. Yes, sir.

Q. Well, I don't understand, were you helping him when he was working for a union tile contractor? A. Yes, sir.

Q. Well, were you in the Helpers Union, then? A. Where I was helping them they didn't have a helpers union.

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[744] Q. Now, you have been on other jobs where the plasterer had put on the mortar coat and you have put on the thin-set material, haven't you? A. Yes, sir.

Q. Have you gone to the plastering contractor and demanded that work that the plasterers are doing? A. No, sir, I have never.

Q. Now, have you put any tile over gypsum plaster? A. Yes, sir, I have.

[745] Q. And you use an organic adhesive for that, don't you? A. Well, they have got what they call Wellcrete or Bondcrete that the walls are painted with and then we go over it.

Q. With your organic adhesive, is that right? A. With our thin-set, or either mastic, if we are using a mastic.

Q. Well, do you know, would you put a dry-set Portland cement mortar over gypsum plaster? A. No, sir.

Q. What would you use? You would use some sort of mastic, you say? A. Well, like I say, you paint, if you use Bondcrete or Wellcrete—

Q. You put a waterproofing over it, you mean? A. Yeah.

Q. Then you put some sort of adhesive onto it to put your tile on, right? A. Well, a mastic or thin-set, either one.

Q. Right. A. You can use either one.

Q. Well what is the difference? You say a mastic or a like L. & M. or a premix.

Q. Right. You would normally use the mastic over gypsum. [746] wouldn't you? A. Well, actually it's according to what your boss wants it installed with.

Q. You could use both.

Which is the organic and which is the inorganic of those two? A. Well, your mastic—I don't know, to tell you the truth.

Q. You mentioned Wellcrete? A. Yes, sir.

Q. Isn't Wellcrete a bonding agent? A. Yes, sir, it is. It makes your material that you are putting on to the surface bond to it.

Q. And then do you put something on top of the Wellcrete? A. Yes, sir.

Q. You would put one of these adhesives on top of the Wellcrete, is that what you are saying? A. Yes, whatever you are going to stick it with.

Q. Well, when you are putting it over gypsum plaster what would be your setting bed, then? A. You stick direct.

Q. Direct to what? A. To the plaster.

Q. But would there be a setting bed in that situation? A. Well, it would be just, you would stick direct to what—a setting bed is when we put, or the plasterer puts the last— [747] our float coat is our setting bed.

Q. Well, you mean it's only called a setting bed if you put it in, is that what you are saying? A. No, sir, I mean we can stick direct to the gypsum board or any of that.

Q. Well, what would be the setting bed when you stick right to the gypsum board? A. That board, what it would be set to.

Q. Does the tile setter claim the installation of the wallboard? A. No, sir, we don't.

Q. How about if you put the tile right over concrete block, do you as a tile setter claim the concrete block? A. No, sir.

Q. Now, you were asked a question about some ceramic tile, if you could set it on a wall that is fairly wet, and I think you said, you know; you couldn't set it on that.

If you got a wall, I am talking about Portland cement mortar now, if that is firm could you put the ceramic tile on it then? A. Yes, sir.

Q. If you started, you know, putting up your float coat about 8:00 in the morning—is that about the time you start work? A. Yes, sir.

[748] Q. You know, in a typical bathroom, say in an apartment house or something like that, about when would that mortar start getting firm? A. Well, it's according to the wall that you float.

Q. Sure, I realize that. Say you have got it on concrete block. A. And usually—you mean when would it start getting hard?

Q. Start getting firm so that you could start laying your tile. A. Well, I would give it—usually the way I do it now, this is the way I do it.

Q. Sure, that is what I want. A. I figure that I can, it's over half of our work, you know, browning out, floating, and I can put up what I float that morning with tile.

Q. You mean you would float it in the morning and then go back and start covering it in the afternoon? A. Yes, sir.

Q. Now, when you are going to put this Crest or L. & M. on the wall you don't want the walls scratched, do you? A. I don't want no scratched wall to stick tile to.

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[752] L. D. McHARGUE

was called as a witness by and on behalf of the Tile Setters and, having been first duly sworn, was examined and testified as follows:

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[753] Direct Examination

[757] Q. How much time of this apprentice program do they spend learning how to put on the float coat or the setting bed? A. I would say between sixty and sixty-five per cent.

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Hearing Officer: All right.

Would you please explain to us how the apprenticeship program operates?

The Witness: As to how the apprentice—

Hearing Officer: Right, how do you begin and how does it [758] end?

The Witness: Well, a union contractor sends a letter of request in to the local requesting a certain or a person by name, and then it's voted on at the Union and, in other words, we have a certain—our apprentices can't be over a certain percentage of the entire membership.

Hearing Officer: In other words, the contractor is requesting that this individual be admitted to the apprenticeship program, is that what is happening?

The Witness: Yes.

Hearing Officer: O.K.

Go ahead.

The Witness: And if he is accepted by both parties, then he is put on the on-the-job training and he picks the trade up with on-the-job training.

Hearing Officer: What does this on-the-job training consist of?

The Witness: Well, he learns how to prepare mortars, he learns how to lay out the tile work, he learns how to square up a room, plumb up a room, he learns how to use his tools, hawk and trowel, and strings and water levels.

Hearing Officer: How does he learn how to do this?

The Witness: Through the supervision of his mechanic. He is assigned with a mechanic.

Hearing Officer: Well, is the apprentice actually [759] performing these functions—

The Witness: Yes.

Hearing Officer: —or is he in an observation capacity?

The Witness: He is performing, he is helping the mechanic, working right with the mechanic.

Hearing Officer: O.K.

Now, how long does this program take?

The Witness: Three years.

Hearing Officer: Is this a uniform program of three years?

The Witness: Yes, it's a uniform program for three years. Of course, the more advanced he is in the program the more he will be able to do on the job, you know.

Hearing Officer: There's no provisions, for instance, at the end of the two-year period if he appears to be performing satisfactorily then to become a journeyman?

The Witness: Yes, if he can have—if it's agreeable with the contractor and if he can get two vouchers, two mechanics that are members in good standing to vouch for him, them he can break out as a journeyman any time after a certain length of time.

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[773] Q. (By Miss Thacker) Now, Mr. McHargue, have you ever asked any plastering contractor for this work in dispute? A. No.

Q. Why A. Well, we don't have any bargaining agreement with the plastering contractors. If we were —the only way we could get this work would be through the Plasterers' business agent, not through the plastering contractors.

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Q. Now, I want to ask you about some, some questions about the float coat or the setting bed. In tile installation where is the real art of the craft? A. That is the question?

Q. Yes. A. The real art of the craft is in, the whole craft, is in the float coat or setting bed.

[774] Q. Can the bonding agent be considered a—

Hearing Officer: Wait. Before you leave that, as long as we are talking about the art, why do you think it is the float coat that is the real art to a tile setter?

The Witness: Well, the float coat brings it out to your finished dimensions, and it works to the tile that you have in hand to apply to this float coat, and just like the case of three-eighths cuts at the header, a tile setter would, or should have avoided that three-eighths cut. In other words, where you have the material on the job to lay out your work with, you can favor here and there to make the tile work to the best appearance, and the person buying the tile gets the most for his money.

Hearing Officer: And you say the float coat, then, has a direct bearing on the appearance of the tile?

The Witness: The float coat is everything.

Hearing Officer: O.K. Go ahead.

Q. (By Miss Thacker) What is the usual thickness or what is the variation of the thickness of your float coat? A. Well, I would say where the plasterer has scratched ahead of us, I would say it would be anywhere in the neighborhood of a half an inch and it would be fairly uniform, but on a one-coat method or two-coat method where the plasterer has only scratched the lath or filled the lath up, it would vary from a quarter to three-quarters of an inch, possibly an inch, [775] and then on one-coat work explicitly unless we have a real smooth surface, it would vary anywhere from a quarter-inch to an inch and a quarter, inch and a half, depending on how much—

Q. And the reason for the variations, explain the reason for the variations. A. Well, humps in the wall, or a wall may be out of plumb, now, out of square, would be the only reason.

Q. Are you saying, then, that you are straightening the wall by the float coat? A. Yes, you are bringing it out to a finished dimension, straight, square and plumb.

Q. Does the plasterer know what the finished dimensions are going to be when he does his work?

Mr. Capuano: Now, I am going to object. How does he know what the plasterer knows?

Hearing Officer: Well, let's let him—

Miss Thacker: Well what I am asking is does the—

Mr. Capuano: I heard what you were asking.

Miss Thacker: Well, maybe you didn't.

Hearing Officer: Maybe he knows the answer.

Miss Thacker: I will rephrase my question, Mr. Hearing Officer.

Q. (By Miss Thacker) Are the finished dimensions available to the plasterer at the time that he puts on his scratch or [776] brown coat? A. You mean as far as the size of the tile is concerned?

Q. Yes. A. I wouldn't think so. I guess he could possibly get them if he knew just exactly how to go about it, but I don't think the plasterer contractor is going to run this material down, and I don't think the journeyman plaserer is going to have any, enough interest in the finished tile work to run the material down.

Hearing Officer: You can develop this on cross, I believe.

Q. (By Miss Thacker) Now, is the tile usually on the job at the time that the plasterer does his scratch coat or brown coat? A. Not normally.

Q. Now, do you generally float ahead? A. Yes.

Q. Do you generally float ahead? A. In some cases we float ahead and in some cases we turn right around and cover up our work. It all depends on what is more feasible as far as the installation of the work, whichever way we can give the contractor the most for the hours.

Q. Does the size or the type of the tile have anything to do with it? A. Yes.

[777] Q. What? A. Well, if you are working small, say small, three-quarter inch ceramic, you have to have a hard surface to put it on to get everything straight and nice, and if it's heavy tile it's got to be firm or it will

pull itself off the wall or sag, and then you have got conditions where possibly the plasterers use a hot scratch coat and your mud will burn on you and when it gets to a certain stage you have a sandy surface on the float coat and you try to put tile on it, you pull the bonding agent and the tile and all off.

It doesn't bond.

Q. It breaks the bond? A. Yes.

Q. Now, Mr. McHargue, on ceramic work, particularly, what about hanging walls where your float coat is wet, does that have any effect on it? A. You mean on the small, say like three-quarter inch ceramic?

Q. Yes. A. You can't hang ceramic over wet walls. You can put it up there but you can't work it. You get it out of shape if you try to pull the paper off it. You fill the ceramic up with sand to hold the joints when you put it on the wall, and if you work it then it gets itself out of shape.

Q. Now, you have used the term hanging. What do you mean by hanging? [778] A. Putting a neat cement coat on the wall or buttering the back of the tile and putting it on the wall, blocking it in.

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Q. Now, on your ceramic tile do you start at the top or start at the bottom? A. Oh, it all depends on what kind of job it is. We start at the top.

Q. You have a line to work from? A. Yes, we have to start from a line regardless of whether we start from the top or from the bottom, and it has to hang to that line.

Q. All right.

Now, if it's a wet setting bed can you stay to the line then? [779] A. No, you can't.

Q. Why? A. When you work your tile it won't stay with the line. It moves.

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[786] Q. Now, I want to ask you something about the bonding agents. What is the purpose of it? A. What is the purpose of the bonding agent?

Q. Yes. A. To stick tile to the wall with.

Q. Is it purely an adhesive? A. Yes.

Q. Would it be comparable, in your opinion, to the glue used by the paperhanger? A. Yes, it allows you about as much room for corrections.

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[788]

Cross Examination

Q. (By Mr. Capuano) Mr. McHargue, is that correct, McHargue? A. Yes.

[797] Q. Now, you talked about your apprentices, you said you have eleven or twelve. Is your apprentice program registered with the B.A.T.? A. Who is B.A.T.?

Q. Bureau of Apprenticeship Training of the U.S. Labor Department. A. As far as I know we are. They are registered with the [798] International Union in the Stake Conference.

A. The Stake Conference is registered with—

Q. And the International Stake Conference is registered? A. Pardon?

Q. You say the International Conference is registered? A. The Stake Conference is registered with—

Q. I am sorry, the Stake Conference is registered with B.A.T.? A. As far as I know they are.

Q. As far as you know.

Do you have some apprenticeship standards that you go by? A. On-the-job training.

Q. Well, do you have anything written down, any sort of written program for your apprenticeship standards? A. We have it, I am sure, but I am not too familiar with it.

Q. You are the business agent of the local? A. Newly.

Q. The newly elected business agent? A. Yes, newly.

Q. Well, for about seven months, now? A. Well, I have been tied up in other areas for the last seven months.

Q. Is there any set amount of time that a person must act as a helper before he becomes a member of your union? [799] A. An an apprentice?

Q. No, as a helper. A. Now, are you speaking of the Tile Layers Union or the Helpers Union now? Which are you referring to now?

Q. Well, do you have any tile helpers in your union? A. No.

Q. Well, then I am talking about the union that the helpers belong to. A. Now, you are asking me if—

Q. If you will let me clarify it, I don't believe I used the word union, at all. I simply asked you is there any set time after which a helper can become a member of your union or does automatically become a member of the Tile Layers Union? A. No.

Q. Do they ever become members? A. Of our union?

Q. Yes. A. If they want to come in on the apprentice program. They don't automatically from a helper become a journeyman tile layer.

Q. They have got to go through the apprentice program? A. They don't have to, but they have got to learn the tile trade somewhere. They can't come in as a journeyman mechanic, from a helper to a journeyman mechanic.

Q. And they don't learn it as a helper, is that what you are [800] telling me? A. That's right.

Q. Supposing you have someone who has been a helper for a few years and he wants to come in your union, he has got to serve a three-year apprenticeship? A. Well, he has either got to serve an apprenticeship to prove his proficiency or he has to go to work in an open shop somewhere and get the experience because he can't come in as a journeymen, from a helper to a journeyman mechanic.

Q. So if he goes to an open shop and get some experience as what, a tile setter? A. Yes.

Q. It that it? A. That is what I would assume.

Q. Well, now, you are the officer. I am not. So is this what he would have to do? A. Well, yes, I suppose if he wanted to be a tile setter mechanic he would have to have some experience from somewhere. Now, we cover marble and terrazzo, too.

Q. All right.

So you talked a bit about these vouchers, too. Is that what you mean, he would have to get two statements from— A. If he came in as a journeyman mechanic he would have to have two vouchers.

Q. Two vouchers from two of your members? [801] A. Two members, not necessarily my members, but members of the Tile Setters of the B.M.P.I.U.

Q. Who are in good standing? A. Yes, who are in good standing, for three years good standing.

Q. In other words, he has got to get vouchers from two members of the B.M.P.I.U, is that what you said, or two tile setters? A. Yes, or install a job and have an examining committee go over the work.

Q. Well, can these two members, must they be Tile Setter members of B.M.P.I.U. or any members of B.M.P.I.U? A. Well, how could a—

Hearing Officer: He is asking the questions now. Answer the one he asked you.

A. Pardon?

Repeat it.

Q. (By Mr. Capuano) I said must these two members who vouch for this man be Tile Setter members of B.M.P.I.U. or can they be B.M.P.I.U. members who do other work, such as cement masons or brick masonry, or so forth? A. Normally it would be of the same craft.

Q. All right. The same craft.

And they have got to be in good standing for three years before they vouch for this helper who wants to come in? A. That is my understanding.

[802] Q. And by that you mean he has got to have, they have got to have their dues paid up for three years? A. Well—

Q. To be in good standing. A. Yes. Not three years in advance.

Q. No, no, I mean they had to be in good standing for three years past in order to vouch for this man who wants to come in as a journeyman, right? A. I believe that's right.

Q. Well, now, what is the relationship between having your dues paid for three years and being able to vouch for the man's ability to put tile on a wall? A. I am not sure I know.

Q. O.K.

So they come in, then, through this apprentice program, getting two people to vouch for them being able to do the work if they are a helper, or you say they can just come to you and ask you to go and inspect a job they did? A. They have. Not to me, no.

Q. Who do they go to? A. They put it, it's brought to the attention of the Union, and there is a committee that goes out, not any one man. There is a committee.

Q. Well, all right, a committee goes out and looks at it? A. A three-man committee.

[803] Q. So you can do it any one of three ways that you can get into your local union, right? A. Yes.

Q. All right.

Now— A. Except an apprentice still has to be vouched for when he finishes his apprenticeship program.

Q. Oh, you still have to be vouched for? A. Yes, he does.

Q. Can he take a test at the end of it? A. If you have vouchers you don't. And normally a shop that he works in will have vouchers.

Q. All right.

Then you made a comment which I am not sure about. You said an apprentice can become a journeyman after a certain amount of time. And as I understood it you

meant different than the end of a three-year period. A. You mean shorter than a three-year period?

Q. Yes. A. That is possible.

Q. Now, how is that possible? A. Well, if he is proficient enough in the trade that he thinks he can command the wages of a journeyman, and the contractor that he is indentured to feels that he is qualified as a journeyman, well, then we, if he can secure the vouchers, [804] then we can turn him loose as a journeyman.

Q. Now, do you actually see that an apprentice gets instruction in all phases of your work. A. We try our best to.

Q. Well, how do you do that, by sending him out in a shop and having him work with journeymen, is that it? A. Normally.

Q. Well, then it's possible that he could go out and work with a journeyman and only be sticking tile on sheetrock or concrete block, isn't it? A. It's possible, I suppose, if that is all the work that the shop that he was working in had, but it would take him about ten years to make a mechanic this route.

Q. So then he wouldn't get any experience in putting up a mortar coat, would he? A. No, he wouldn't. He would be a thin-set mechanic when he got through.

Q. Right.

So fifty per cent of his time wouldn't be spent floating out walls, would it? A. Well, we are speaking of a three-year program and a man being a mechanic when he finishes.

Q. Yes, but if for three years he isn't spending all this time doing jobs where the tile setters are floating out walls, he is not going to be spending fifty per cent of that three [805] years floating out walls, he is? A. Well, I don't suppose he would, possibly not spend fifty per cent or sixty per cent or seventy per cent.

Q. You don't know how much of it he would spend, do you? A. Well, I would say if he worked on the right type of work he would spend sixty-five to seventy per

cent of his time learning how to float a wall, plumb it up, square it up. And of course, all this pertains to floating.

Q. You are saying that if during the three-year period all the jobs he worked on were the type where the tile setters put the float coat behind the, what I call the setting bed, and you call the bonding agent, then he would spend fifty per cent of his time, isn't that what you are saying? A. Yes. No, I said sixty to sixty-five per cent.

Q. Sixty per cent. But that is assuming that he is going to be working on those types of jobs only for three years, right? A. Uh-huh.

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[817] Q. Now, you didn't talk, or did you talk to the general contractor when you went out there? A. Did I talk to the general contractor?

Q. Yes, on the Westbury or Jeff Davis jobs. A. No, the superintendent on the Westbury School was, I spoke to him as I walked down the hall, but I didn't have any conversation with him.

Q. Oh.

Well, did you ask him, for example, at the Westbury School, that superintendent yesterday, if he knew of any other reason why that wall that you didn't like could have been out of plumb or out of square? A. No.

Q. Did you inquire of the plumber if perhaps he put his pipes in in such a way that the wall couldn't be plumbed? A. Well, the plumbing, as I remember, was all stubbed out with about six-inch stubs on it, and there was no restriction at the ceiling that I could see, and the plasterer had, as far as I could see, he had about six inches if he wanted to to come out there to plumb that wall up.

Q. And, of course, it's your opinion that in a building there [818] are no finished dimensions to make, if a plasterer want to bring the wall out six inches he just brings the wall out six inches, is that correct? A. Well, no, not in a sense.

Q. The architect will be quite upset about bringing a wall out six inches, wouldn't he? A. Probably so.

Q. Let me ask you this, when a job begins whose responsibility is it to strike a line to show where walls and doors are going to go? A. Whose responsibility is it to lay out the building?

Q. In effect to lay out the building, yes. A. I would say it would be the superintendent.

Q. The general superintendent, right. And he says this is where wall A is to go, right? A. Uh-huh.

Q. And door B, and so forth, right? And you are to work to where he puts the wall and where he puts the door, right? A. Right.

Q. The tile setters, even when they are putting the thin-set method on and they are only putting the L. & M. over a wall prepared by another craft, they can make mistakes so that the wall isn't going to have that perfect finish that you insist upon, can't they? A. About like a paperhanger can make mistakes hanging paper.

Q. Well, if you want to take that comparison, have you ever seen paper that has been hung on a wall that didn't match up right and didn't look right. A. Yes.

Q. So then your tile setters can also make mistakes, can't they? A. Yes.

Q. I am glad to hear you admit they are human.

Now, in your travels yesterday did you go to any jobs where the tile setters only put the dry-set mortar over backing prepared by plasterers? A. Uh-huh.

Q. To check and see if the tile setters have made any mistakes? A. No.

Q. You didn't do that? A. They made mistakes, all right.

Q. Who, the tile setters? A. Yes.

Q. But you didn't make any list and take the measurements, did you? A. Well, they made their mistake by covering it up, really.

Q. Well, now, you heard what I said. In the other jobs did you go to see them and make detailed measurements

about mistakes that the tile setters made? [820] A. Well, how could you determine what was a mistake? If the wall was out of square, out of plumb, it's going to throw the courses off. How could you tell whether he made a mistake or not?

Q. Well, now, you are telling me if the tile is already on and the job is finished you can't really be sure whose mistake it was, if it doesn't look good, aren't you? That is what you are saying, isn't it? A. No, I don't think so.

Q. You are not saying that. A. I can tell whether the foundation is straight or not, regardless of whether it's finished or unfinished. And the tile is going to be no better than the foundation behind it.

Q. You have never seen a tile job where the L. & M. wasn't mixed properly and it got a little bumpy back there and when the tile setter put his tile over nice straight backing he made it wavy? A. I don't recall seeing this.

Q. You don't deny that it could happen, do you? A. I don't deny that it could happen, but he would have to try to do it.

Q. But then in that case it wouldn't be the fault of the person who put up the backing, would it? A. No, it wouldn't.

Q. It would be the tile setter, wouldn't it? [821] A. Yes.

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[823] Q. Now, you talked about the art of your craft as being the float coat, do you recall that? A. Yes, sir.

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Q. Now, you don't claim gypsum when you put up tile over gypsum, do you? A. No.

Q. That back-up can effect the way your tile looks, can't it? A. That's right, when they buy tile put on that way they get what they pay for.

Q. Right.

But if you put the gypsum up you could give them the type of job apparently that you say you give them if you put the Portland cement up, is that right? A. We could control the finished room dimensions.

Q. Well, you could give them the straight wall you claim you give them if you put the Portland cement up, too, couldn't you? [824] A. Probably so.

Q. But you make no claim for that, the gypsum? A. No.

Q. Do you know how gypsum is put on a wall? A. With a hammer and nails for the most part, in this area.

Q. You are talking about—— A. Wallboard?

Q. Yes. How about gypsum plaster, how is that put on a wall? A. That is put up in plastic form by plasterers.

Q. How do they do it, do you know, what tools do they use? A. Mostly they use a blowgun.

Q. What other tools do they use? A. And they finish it with a hawk and trowel.

Q. What tools do you use to put it up when you use Portland cement? A. Hawk and trowel.

Q. Now, how about this little bubble thing you talked about? A. Pardon?

Q. This little thing with all the bubbles in it, the level. A. The level?

Q. Are the tile setters the only craft in the construction industry that use a level? A. I believe they are.

Q. They are the only craft? [825] A. Yes. The rest of them carry them, but I think they are about the only ones that use them.

Q. Now that you have given me that answer——

Hearing Officer: The record won't reflect that we were being funny here, I don't think, and——

Mr. Capuano: I certainly wasn't.

Hearing Officer: And I think we better be serious about this thing so that the record will be correct.

Mr. Capuano: I am.

Hearing Officer: Because it doesn't pick up inflections and so forth.

Q. (By Mr. Capuano) Now, are the tile setters the only craft that use a level? A. No, they are not the only craft.

Q. Carpenters use levels? A. Yes.

Q. Plasterers use levels? A. This I can't vouch for.

Q. You have never seen a plasterer use a level? A. I have on occasion.

Q. All right. Plumbers use levels? A. This I don't know.

Q. Bricklayers use levels? A. Yes.

Q. Now, you say the finished dimensions aren't available to [826] the plasterer.

Now, you weren't talking about the finished dimensions of the room, were you? A. Come again with that.

Q. You said on direct that finished dimensions weren't known to the plasterers on a job. A. I believe we qualified that, didn't we?

Q. How did you qualify it? A. I asked her if she was referring to the finished dimensions of the room or with the tile that was going to be used in the room.

Q. All right. I am sorry.

Well, let's take the finished dimensions of the room. You didn't mean that the plasterers don't know the finished dimensions of the room, did you? A. No, I don't mean that.

Q. All right.

They do know that as far as you know? A. Well, it's available to them.

Q. Sure, it is. And you were speaking only of the size of the tile right? A. Right.

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[838] Q. What do you mean by firm? A. Pardon me?

Q. You used the word firm before. A. In regards to what?

Q. In regards to mortar on the wall. A. Hard, in other words.

Q. Well, how hard is firm? How hard is hard. A. Well, it all depends on what you are going to put on it.

Q. Well, would you say a wall is firm after five hours? A. In some cases it would be more than firm. It would be hard or set.

Q. After five hours? A. Uh-huh.

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[841] Q. (By Mr. Capuano) Mr. McHargue, on this Anderson Library job what coat were the plasterers claiming? A. Pardon?

Q. On the Anderson Library job. A. They were claiming our float coat.

Q. All right.

Now, that was the, let's stay in the bathroom for a while, that was the first coat on the concrete or masonry wall and the second coat on the metal lath, is that right? A. Yes.

Q. And you put, the tile setters put on that coat? A. Yes.

Q. And this was the coat that the plasterers claimed, right? A. Yes.

[842] Now, did Longshore tell you those were the coats he wanted or that was the coat?

Pardon me? A. That is what I understood. Now, he didn't make any claims on the bathrooms, as I understand it.

Q. Well, you mean the bathrooms were finished by the time we had the strike, and so forth? A. When we had our first meeting out there was in in connection with the stair wells and the bathrooms were finished.

Q. Right, the bathrooms were finished at that time. A. Uh-huh.

Q. All right.

Let's take the stair wells, too.

You had a coat of mortar over the masonry wall, right? A. Right.

Q. And you had a scratch coat over the metal lath, then a second coat over the metal lath? A. Yes, that is in the metal partition.

Q. Right.

So there, too, he was claiming the first coat on masonry and the second coat on metal lath, right? A. Right.

Q. All right.

Now, did your International Union send you a copy or inform you—well, let me put it this way, did they send you [843] a copy of the Joint Board award of November 10, 1966? A. I believe so.

Q. Pardon me? A. November 10th? Yes, they sent me a copy.

Q. Did you get that around the date that it came down, in other words, in November? A. Well, I believe I got mine a little later than Mr. Longshore got his.

Q. All right.

That is P-3, and it's dated November 10th.

But you got it within November, anyway, won't you say? A. Yes, I would say.

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[847] Hearing Officer: On the record.

In a brief off-the-record discussion it's my understanding of our conversation that we can stipulate that Local 20, which is an affiliate——

[848] Mr. Shepherd: Subordinate.

Hearing Officer: Subordinate to the International—whatever the initials are——

Miss Thacker: B.M.&P.I.U.

Hearing Officer: Is bound to the decision of the National Joint Board, correct?

Miss Thacker: Yes.

Mr. Capuano: And, of course, so is our Local, Local 79. How about the Helpers Local, they would be, too, wouldn't they?

Mr. Shepherd: I think they would be.

Miss Thacker: I think they are.

Mr. Shepherd: Because we have a tri-party agreement with them from years ago.

Miss Thacker: They are bound through the national agreement. But there again they are not a craft, but then——

Mr. Capuano: They are part of the Building Trades.

Miss Thacker: But the Hod Carriers are not a craft, and they are one of the basic trades of the A.G.C., so you don't have to be a craft to be bound.

Mr. Capuano: So we are stipulating that all three local unions that are involved in this case are bound to the Joint Board, is that correct?

Hearing Officer: Is that right?

Miss Thacker: As far as I know, yes.

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[850] Q. And since we have already agreed that your local was bound by the Joint Board you did not comply with the Joint Board award, did you? A. I did comply with the Joint Board award.

Q. We just went over what work was in dispute. A. I know what we went over, but we put on one coat of mortar, which we are entitled to, and that is all we did, regardless of whether it was one or a dozen on there, we are entitled to the last, final coat.

Q. You are saying regardless of what the Joint Board says, [851] you are entitled to one coat, is that what you are saying? A. Well, yes.

Q. In other words, you have got this voluntary method for settling disputes, but you didn't like the way they decided that case so you didn't pay any attention to it? A. It says here that we are entitled to the final setting bed.

Q. That's right, but they did also say that the work in dispute, the coat you knew that was in dispute, was assigned to the plasterers, didn't it? A. Except.

Q. Well, I don't think we have to keep going back over this, but you told me, and I am sure I understood you, you knew exactly which coats the plasterers were claiming. A. That's right, they were claiming my coat.

Q. And then you got a decision which said the work in dispute, work the plasterers is claiming, shall be assigned to the plasterers. Now, that is pretty clear, isn't it? A. If you read it all.

Q. I have no objection to you reading it all. The last sentence says except the final setting bed. A. Except the final setting bed, which shall be applied by the tile setters.

Q. Well, did you write back to the Joint Board and say, "Well, clarify what you said"? [852] A. No, I told them the final setting bed was all we were doing on the job.

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[853] Q. Well, now, in this situation, I believe there has been testimony there wasn't room for two coats—— A. That's right, so that makes it our work. They are excluding the plasterer, not me. There is a final coat on that wall out there.

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[856] Redirect Examination

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[857] Q. All right.

Now, moving on to another area, we are talking about the wet float coat and the dry float coat. Does humidity have anything to do with the drying of the mortar? A. Yes.

Q. I would affect it? A. Yes.

Q. Higher humidity, what effect does it have on the drying? A. The higher humidity?

Q. Yes. A. The slower it dries.

Q. So do you have any idea how the humidity normally runs in this area? A. Well, there is a certain time of the year that you can control your mud pretty well and, say, this month and next month, possibly. Then in the fall of the year there is another month or so in there that you can control it pretty well, September and October, or October and November. And the rest of the time it's either burning up or hanging wet.

Q. Are the buildings where you work usually air conditioned or heated when you are in there [858] A. No.

Q. So then humidity is a big factor in the drying of your float coat? A. The humidity and the back-up that

you are working against, and it all depends on how the plasterer mixes his scratch coat and brown coat, and there are several different elements that could enter into it as to how your mud sits on the wall,

Q. These are all factors, you are saying, beyond your control? A. Yes.

Q. Beyond the tile layer's control. A. Yes.

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[861] JAMES F. O'CONNELL

was called as a witness by and on behalf of the Tile Setters and, having been first duly sworn, was examined and testified as follows:

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Direct Examination

Q. (By Miss Thacker) Mr. O'Connell, how long have you been a tile contractor? A. About eight years.

Q. Are you a tile setter? A. Yes.

Q. Do you belong to Local 20? A. Yes.

Q. Are you a member of the Local Association of Contractors? A. Yes.

Q. Are you a member of the National Association of Contractors? [862] A. No.

Q. Are you bound by decisions of the National Joint Board? A. No.

Q. Would you willingly bind yourself to any decisions? A. No.

Q. Do you do all types of tile installation, conventional float coat or one coat and thin-sets? A. All types.

Q. What per cent of your business is conventional or one float coat? A. Eighty per cent.

Q. Eighty per cent. A. Yes. Is conventional?

Q. Yes, conventional or one coat. A. Twenty per cent.

Q. Twenty per cent.

So that then if the tile setters lost that coat in this award you would lose that work? A. Uh-huh.

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[872]

CHARLES S. STRAWN

was called as a witness by and on behalf of the Plasterers and, having been first duly sworn, was examined and testified as follows:

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Direct Examination

Q. (By Mr. Capuano) Mr. Strawn, would you tell me what your position is, please? A. I am Executive Director of Texas Lathing and Plastering Contractors Association.

Q. And what is the Texas Lathing and Plastering Contractors Association? A. It is a trade organization composed of lathing and plastering contractors in the State of Texas.

Q. And you are the Executive Director, you say? A. Executive Director, yes.

Q. Now, Mr. Strawn, let me ask you this, how long have you held this position? A. Since September, 1952.

Q. I am going to show you what has already been marked in this case as Exhibit P-16 and ask you if you recognize it? A. Yes, I do.

[873] Q. Could you tell me what that is? A. This is a joint specification guide that was developed by the Texas Lathing and Plastering Contractors Association and the Texas Ceramic Tile Contractors Association, setting out the general specifications for lathing, plaster and ceramic tile applications.

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[874] Q. (By Mr. Capuano) Could you tell me, please, what initiated the bringing together these two associations which resulted in the publication of P-16? A. Perhaps general problems between the lathing and plastering contractors and the tile contractors occasioned by the fact that in many specifications the responsibility of the tile contractor and the plastering contractor were not specific-

ally spelled out, and therefore we had questions come up on the job after the job was bid and also during the bidding processes as to exactly what was covered by the specifications.

Q. Were there any other reasons that the two groups got together? A. That and the need, recognized need to establish standards that were acceptable to both the tile contractor and the plastering contractor.

Q. Any other reasons? A. If I—

[875] Excuse me. A. We first became acquainted with the tile contractors association and tile contractors through our mutual interest in selling and promoting lath and plaster, in lieu, particularly, of structural glazed tile. We found that in our sales promotional work the two-inch solid partition with tile wainscoating was more economical than the structural tile and therefore we actively tried to sell that type of installation.

In doing this work I became personally acquainted with Charles Montgomery in Waco who is very enthusiastic and energetic in his sales promotional work.

Q. Of what product? A. Of ceramic tile. He was a ceramic tile contractor.

Q. I see. And that is what brought it about? A. This, in our discussions——

Q. With whom, now, are you talking? A. With Mr. Montgomery and others in the tile contracting business, we felt that it was to our mutual advantage to try to work out specifications that were acceptable to both contractor groups and to the architectural profession.

Q. All right.

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[878] Q. Did you also make any other arrangements with Mr. Montgomery around this time for a committee of tile contractors to meet at your convention? A. Yes, it was mutually agreeable that they would, a committee from the Tile Contractors Association would meet with our convention and discuss specifically the possibility of developing a joint specification.

Q. O.K.

Now, could you tell me who Mr. George Brueggeman is? A. Mr. Brueggeman is a lathing and plastering contractor here in Houston, doing business as Tobin & Rooney, is a past president of our association, and was active in the discussions on this specification.

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[880] Q. All right.

Now, were there several meetings held between the committees from the two associations on this, to work out this? A. There were, specifically I remember the one in Houston, even though I was unable to attend the one in Houston. There was one in Austin. I believe we had two different meetings in Austin. And there was other correspondence passing back and forth, or work sheets, involved in the specifications.

Q. You mean drafts? A. Drafts between the contractors association and the tile contractors association.

Q. All right.

I show you what has been marked as—or let me ask you this, first. Did a time come when you sent out to your membership one of the proposed specifications? A. This is the letter you handed me just a while ago dated December 3, 1959.

Q. And what exhibit is that, P-20-G? [881] A. This is P-20-G.

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Q. (By Mr. Capuano) Go ahead. A. This is a letter from Mr. George Brueggeman, who at that time was President of the Texas Lathing and Plastering Contractors Association, directed to TLPCA members, informing them of the committee meeting that was held in Houston and submitting some basic information that was developed at that time, and telling them that this was the beginning of the negotiations or the discussions, and inviting their comments and suggestions on the continuation of the work of the committee.

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[883] Q. (By Mr. Capuano) Before we get into this exhibit, do you [884] know whether when you sent your letter of December 3, 1959, out to your members, whether the Tile Contractors Association was notified that you were sending that out?

You will have to go back here. A. I believe so.

Q. This one here (indicating), P-20-G.

Do you recall whether they were notified that you were sending it out to your contractors? A. As I recall, it was agreed that we would each send it to our contractor members for their review and approval.

Q. The respective members? A. The respective associations would.

Q. All right.

Now, after this meeting you had in March, what else took place after that? A. The meeting we had in Austin in March you are referring to?

Q. Yes. A. We reviewed the work sheets and more or less firmed them up in accordance with the information furnished by the Tile Contractors and Plastering Contractors, and forwarded a copy of it to the Tile Contractors with a letter, suggested letter of transmittal as to how this specification in finished form would be transmitted to the architectural and specification professions.

[885] Q. All right. Is that what P-20-M is? A. Yes, it's addressed to members of the Plastering Contractors Committee and the Tile Contractors Committee, and we point out that the specification would not be transmitted by any or through either association but would be transmitted jointly, and we included for their review a memorandum addressed to the architectural professions and signed jointly by Mr. George Barnard, who at that time was President of the Texas Ceramic Tile Contractors Association, and Mr. Ray Taylor, who was President of our Contractors Association at that time.

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[886] Q. (By Mr. Capuano) Now, was there further discussion among your group concerning the specifications after that? A. After——

Q. After this. A. After that letter of transmittal went out?

Q. Yes, uh-huh. A. Yes, it was discussed among our contractors and the board members and in the meantime we had changed association presidents again, and perhaps like other things you get a little dilatory in completing projects, but when we got our new president of the association who was very interested in [887] going ahead and completing this thing since we had it practically in completed form, and getting it distributed, that was Mr. Joe Rourke, who was our new presisdent, or president of our Plastering Contractors Association.

Q. All right.

So would you tell us what P-20-O is, then?

* * * * * * * * * *

A. This memorandum is dated August 1, 1961. It's addressed to Mr. Bill McHargue, who had again become president of the Texas Ceramic Tile Contractors Association, and Mr. Joe Rourke, who was the new president of our association, addressed to them by me, attaching a copy of the transmittal guide that had been corrected in accordance with our previous discussions and a copy of the specifications agreed upon in joint committee meeting in Austin, March 13, 1960, and stating that if the letter of transmittal is O.K., had been cleared with Mr. Taylor and Mr. Barnard previously, and if it was satisfactory for the two new presidents for their signature, then we would proceed with the duplication and distribution of the specification that had been previously agreed upon, agreed upon by the committees from the plastering contractors and tile contractors associations.

Q. Now, was the letter of transmittal, which you included with the guide specifications, similar to what has

already been [888] introduced as—— A. With the exception of maybe one correction.

* * * * * * * * * *

Q. (By Mr. Capuano) Now, I show you P-20-P, -Q and -R, and P-20-P and P-20-Q are each four-page documents, and are basically [889], the same, and I ask you if you recognize P-20-P, -Q and -R? A. Well, I will start with P-20-P. Well, first, when the final, when we were finally in agreement, I say we, the committee from the plastering contractors and the committee from the tile contractors, were in final agreement on the specification, we sent a copy of the final draft to the president of the tile contractors who was at that time Bill McHargue, and to our president, who was Joe Rourke.

Q. Is that the August 1, '61 memorandum we just had here, P-20-O? A. Yes.

Q. All right. A. In which we asked them to each of them initial each page of the specification so there would be no question about what had been officially approved by each organization. These copies were returned by each association, initialed by Mr. Rourke and Mr. McHargue, each page of the specification so initialed.

Q. All right.

Now, taking P-20-P first, there are the initials—— A. J. E. R., Joe E. Rourke.

Q. All right. And those appear on all four pages? A. Correct.

Q. All right.

And on Exhibit P-20-Q—let me ask you this first, is [890] P-20-Q, the typed material, the same as the typed material on P-20-P? A. It's identical. Identical.

Q. All right.

And there are initials on the bottom of that. A. B. B. M.

Q. And whose initials are those? A. Bill McHargue, who was president of the tile association at that time.

Q. And do his initials appear on all four pages? A. On all four pages, yes.

Q. All right.

Now, could you tell me what P-20-R is? A. This letter is dated August 2, 1961, addressed to me by Mr. McHargue. It's a handwritten note in which he tells me the secretary is on vacation so he will write it, himself, in which he returned signed copies of the guide specification and mentioned the fact that he thought it was a very good idea, and he hoped that architects appreciate the combined efforts of our two associations and specifically mentions the work that Charley Montgomery did on this, along with some counsel from Bill Love.

Q. O.K.

Now, I am showing you P-20-S, -T and -U.

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[891] Q. And would you look at all three of those and then you can tell me what they are. A. This is P-20-S, -T and -U, and——

Q. Take the first one, S. A. All projects finally get around to money. This is a letter——

Q. Well, take S first. A. All right.

Q. That is the letter of August 4, isn't it? A. Dated August 4, in which I addressed a letter to Mr. Bill McHargue, thanking him for returning the specification, and telling him that we planned to run twenty-five hundred copies, that approximately sixteen hundred copies will be mailed to architects along with the accompanying letter.

Q. That was the letter that had been agreed to? A. That had been returned previously, yes.

Q. Right. A. And telling him that we had already typed the envelopes to mail to the architects and the cost of the printing would be one hundred eighty dollars, and that I wondered if his organization, the Tile Contractors Association, would be interested in bearing any part of the printing expense.

[892] Q. All right.

And P-20-T?

A. Is dated August 8th, 1961, addressed to me from Mr. Bill McHargue, telling me that the matter of sharing

the cost of the printing of the specification would have to be brought up at their board meeting, which would be in January of 1962.

Q. That is of the ceramic tile—— A. Ceramic Tile Contractors Association, yes.

Q. All right.

And P-20-U.

A. Dated August 11, 1961, addressed to Mr. Bill McHargue, by me, telling him not to worry about the cost, that we would go ahead and mail the specifications out and would still welcome any financial assistance that they might give us as a result of their board meeting.

Q. Now, did you handle the mailing of the specifications? A. We mailed them and in this note I notified him that they had been mailed. We mailed seventeen hundred copies to architects and specification writers, and sent one hundred copies to Mr. McHargue for whatever distribution he wanted to make among the tile contractor members.

Q. Were they architects here in Texas? A. Yes, sir, only in Texas.

Q. Were some of them from the Houston area? [893] A. All over the State of Texas.

Q. All right. A. They were mailed out in accordance with the registry of the Texas Society of Architects.

Q. All right.

Now, is P-16 a duplicate of what you sent out? A. This is what was sent out, signed by Mr. McHargue and Mr. Rourke, just as it is here, without any letterhead on it.

Q. You had no letter head on the one you sent out? A. No, no.

Q. All right.

Now, let's see, it was Mr. McHargue who said in P-20-T, I believe, that they were going to take up the financial question in their January, '62 meeting. Did there come a time when you received anything further from the——

A. Shortly after the Ceramic Tile Contractors meeting in January, '62 we received a check from the Tile Contractors Association in the amount of ninety dollars covering half of the printing cost.

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[900]

Cross Examination

Q. (by Miss Thacker) Mr. Strawn, what is the purpose of the association which you represent? A. We are a trade organization rendering a service, a membership service, to our members on business matters, contractual documents. Also we are interested in the promotion of the lathing and plastering industry, furnishing technical service to our members, and coordinating the work of our association with other industrial groups throughout the country, plastering groups throughout the country.

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[906] Q. (by Miss Thacker) Who were the members of the Tile Contractors Association that you met with on the committee? A. I do not have any record of their activity.

Q. Well, now, I notice here in P-20-G, you make reference here to certain—now, here again this is written from Mr. Brueggeman. [907] A. Yes.

Q. I notice here that you make mention of—— A. Mr. Brueggeman makes mention.

Q. Yes. Makes mention of certain men here, Charlie Montgomery, Bill Love, Lee Munz, and a Mr. Young.

Now, who were these people? Were they on the Tile Contractors committee or who were they? A. I presume so. This was a meeting that I did not attend.

Q. You did not attend? A. Yes. And let's see, Mr. Brueggeman states he sat in with a representative of the Tile Contractors Association which included the persons you named.

Q. So you couldn't verify this, then. A. Mr. Brueggeman could.

Q. But you could not. A. No, I was not present. This letter was mailed by the association office for Mr. Brueggeman.

Q. Yes.

Well, now, then you didn't dictate this letter. A. I expect this was written in Mr. Brueggeman's longhand, made from notes at the meeting. Normally that way our association operates.

Q. Do you know this Mr. Young that they refer to here? A. I do not know Mr. Young, no. I do not believe I do.

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[914] Q. (By Miss Thacker) Now, Mr. Strawn, this guide, guide for specifications, this was prepared by whom, both associations or how did it come to be? A. It was prepared in joint committee meetings between the Plastering Contractors Association and the Tile Contractors Association. After drafts had been worked on on different occasions and mailed to the parties concerned, the final draft copy was prepared in our association office, the Plastering Contractors Association office, and forwarded to the officers of both associations for their approval and authority to print and distribute.

[915] Q. Now, you said to the officers of both associations. A. Yes, ma'am.

Q. Was there any presentation to the membership of both associations? A. To our membership there was. The Tile Contractors Association I have no knowledge of it.

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[917] Q. But to your knowledge there were no actual demonstrations or trial runs made in this? A. In connection with this specification, that's correct.

Q. Now, to your knowledge was there any union representatives present or did they have an opportunity to participate in the preparation of this guide? A. The unions were not a member of these committees.

Q. Yes. A. And our International Union was furnished copies of it as a matter of information.

Q. The lathers and the plasterers? A. Yes, the Plasterers International Union, but they were not—

Q. Well, you also have contracts with the lathers. Were [918] they furnished copies? A. This specification did not particularly refer to the lathers or lathing operation.

Q. Well, it did insofar as the metal lath— A. That is normally an accepted presentation, yes.

Q. Yes. Now, you say this was referred to the Plasterers Union? A. Yes.

Q. Internationally or locally? A. To the International business, I mean their International representative, yes.

Q. Mr. Power? A. No, Mr. B. F. McClellan.

Q. Oh, Mr. McClellan, the International man for this area. I know him. A. Yes.

Q. All right.

Now, to your knowledge did the plasterers sit in on any of these committee meetings or make any recommendations? A. To my knowledge they did not.

Q. Do you know anything about the tile setters, did they offer any information or data to your committees in connection with it? A. That I do not know.

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[922] Q. Then would you say that in the writing of any specifications or any guides that it would be necessary to consider an agreement between the two crafts that you are dealing with? A. The guide specification that you refer to was developed by a joint committee of the Plastering Contractors Association and the Tile Contractors Association. It is a [923] specification for use of the architect in specifying building needs. A copy of the specification was furnished to the Plasterers International Union representative, and I do not know whether the Tile Contractors so consulted their representative.

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Q. All right.

Then are you telling me that your specifications, as far as you know, from the standpoint of your association, was made up without any conferences or any regard to the crafts that are involved? A. No, I can't say that.

Q. All right. Can you tell me, then, that they were?

Mr. Capuano: I believe he wanted to finish an answer. A. Mr. McClellan was furnished a copy and his suggestions or the suggestions and recommendations of his international union were invited.

Q. (By Miss Thacker) Did he respond? A. I believe so.

Q. He went before your committee? [924] A. He did not appear before the committee. Neither did other members who had an opportunity to review the specification appear before the committee.

Q. What about the tile people? A. You will have to ask them about that.

Q. You don't know anything about that? A. No.

Hearing Officer: Let's define the tile people. Are you talking about the union or the association?

Miss Thacker: No, no, in this guide, Mr. Hearing Officer.

Hearing Officer: Well, I mean, you are talking about tile people. Are you talking about the Tile Setters Union or the Tile Contractors Association?

Miss Thacker: Yes, I am talking about the union furnishing any information.

Hearing Officer: O.K.

Q. (By Miss Thacker) And you say you don't know? A. That's correct.

Q. You don't know whether they did or they didn't. A. The information was furnished to the Tile Contractors Association for whatever distribution they deemed proper to make.

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[928] Recross Examination

Q. (By Miss Thacker) Mr. Strawn, do you know if this guide has been approved by the membership of the Texas Ceramic Tile Contractors Association? A. I do not. Copies, one hundred copies were furnished to the Tile Contractors Association at the time it was completed.

Q. Did you send them out? A. Yes.

Q. You sent them out— A. From—

Q. —from your office? A. In Austin, yes.

[929] Q. All right.

Was that the completed guide or the guide in its working stages? A. That was a guide after it had been finally approved by both associations.

Q. Now, what constituted approval by the Texas Ceramic Tile Contractors Association? A. It was sent to their president.

Q. By you? A. By the Austin office, yes.

Q. Yes. A. By the Contractors Association office.

Q. All right.

Now, you sent it to the president. A. Yes.

Q. Then what? A. And asked for the final approval of their association. He returned it with his approval and initialed each sheet of the master copy of the specification or the guide.

Q. Do you know whether it was submitted to the membership— A. I do not.

Q. —of the Texas Ceramic Tile Contractors Association? A. No, I do not.

Q. Did he make any, he, the president of the association, did he make any indication to you as whether or not it was [930] submitted to the membership? A. I do not recall that he did, no.

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GEORGE H. BRUEGGEMAN

was called as a witness by and on behalf of the Plasterers and, having been first duly sworn, was examined and testified as follows:

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[931]

Direct Examination

Q. (By Mr. Capuano) Mr. Brueggeman, will you tell me what business you are in, please? A. I am a lathing and plastering contractor.

Q. And what is the name of your company? A. Tobin & Rooney, Inc.

Q. And what is your position with Tobin & Rooney? A. President of the company.

Q. How long have you been with Tobin & Rooney? A. Since January 1st, 1946.

Q. Would it be fair to say that you are one of the larger plastering and lathing contractors in this Houston area? A. I am one of the larger ones, yes.

Q. Now, in connection with your business does your company prepare walls to receive tile? A. Yes, we do.

Q. And could you tell me what materials you use to do this? A. Well, depending upon the specifications, we, of course, as lathing contractors, if lath is involved we apply the lath, [932] and we do the scratch coat and brown coat either out of a gypsum plaster or out of a Portland cement plaster.

Q. Now, could you define for me the words plaster materials? What would that include? A. Well, plaster materials, as such, are cementitious materials and we use various products. Gypsum is one of them that is refined into a plaster and is generally regarded as plaster. But we also use to a great extent Portland cement plasters. As a matter of fact, I would say possibly forty per cent Portland cement plasters and around sixty per cent gypsum plasters. But we refer to them as plaster, both of them.

Q. You mean forty per cent of your business is the use of Portland cement plaster? A. Yes.

Q. Could you tell me how Portland cement plaster is applied to a wall? A. Well—

Q. I mean the tools used, for example. A. Well, if it's a hand application it's applied with a hawk and trowel. If it's a machine application it's pumped onto the wall and rodded off and screeded.

Q. Could you tell me how gypsum plaster is applied to a wall? A. Exactly the same way.

[933] Q. Now, could you tell me if you have jobs, particularly individual jobs, where the tile is applied on the same job over both Portland cement and gypsum plaster? A. You mean on the same job tile being applied to Portland plaster as well as gypsum plaster?

Q. Yes. A. Yes, there are jobs, for instance, we go into, say, bothroom areas in which we would apply gypsum plaster to which tile is applied, and in, say, the shower area or the tub area, itself, we would apply Portland cement plasters. In a case like that both materials would be used in the same, say, given bathroom area.

Q. I see.

What craft would apply this gypsum and Portland plaster? A. Plasterers.

Q. Do you have a collective bargaining agreement with the Plasterers Local 79 here? A. Yes, we do.

Q. And this work would be included within that agreement, the work you are— A. Yes.

Q. Now, could you tell me after your company through its plasterers applies—let me ask you this first, if tile is going to go on a wall in one of your installations, what coat or coats of plaster will your company apply? [934] A. Basically if we are going over metal lath we would apply a scratch coat and a brown coat.

Q. And then what would come after that for the tile? A. Depending upon the specifications, if it were a thin-set application they would apply a coating of thin-set material and then their tile. If it's conventional, they would apply

a setting bed coat, of, oh, approximately three-eighths or something like that, and then apply their tile to that setting bed. In other words, the setting bed is acting as the bond between the materials.

Q. I see.

Now, when your company is installing the—well, let's define these coats, now. The first coat would be the scratch coat and the second coat that you put on would be what? A. Would be the brown coat.

Q. Would be the brown coat. Would that also be the plumb coat, too? A. Yes, it's referred to as a plumb coat.

Q. All right.

Well, now, when your company is applying the brown coat to walls that are going to receive tile in the thin-set method, as you described, could you tell me if any other crafts besides the plasterers have ever made claims upon you for this work? A. On thin-set, now?

[935] Q. Yes. A. I don't recall—let's see. Thin-set.

Q. In other words, for your brown coat. A. I don't recall in a thin-set application of any claim. I think we have had—again I am not real familiar—

Q. Well, I mean to you, so far as you know. A. Well, for instance, take one of the—shall I name names as far as jobs?

Q. Sure. A. I am thinking of the University students center. We were putting up what was called for in the specifications as a plaster, solid plaster wall. We scratched the metal lath. We intended to brown it, and there was a dispute over the brown coat. I don't know whether this was going to be thin-set. According to my reading of the specifications it was going to be a conventional set. But I am not positive one way or the other whether it was going to be or whether it was applied thin-set. I didn't follow the job through.

Q. Well, leaving that one dispute aside, have the tile setters ever made any claims upon you for the installation of your brown coat? A. Actually when I have it in my specifications I have never been involved with the ceramic

tile union. They have never claimed, they have never tried to get me to use their employees.

[936] Q. O.K.

Now, do you operate in the Houston metropolitan area? A. Yes, I do.

Q. And you operate in other areas also, is that true? A. Yes, I do.

Q. All right.

Now, could you give me, if possible, a few jobs where you have installed at least a brown coat of mortar, you may have installed a scratch coat behind it, and at least a brown coat of mortar, where tile was then installed by a tile contractor over your brown coat with one of these dry-set mortars in the thin-set method? Can't you think of some jobs offhand? A. Oh, there are many jobs that we have applied. I could go all the way back to, well, Methodist Hospital would have been one.

Q. Is that in Houston here? A. That is in Houston here.

Q. Approximately when? A. Well, we have been on three different jobs there over the past seven to ten year period in which we have applied—

Q. You have applied the brown coat? A. Yes, uh-huh.

Q. And the tile setters have come in and used a thin-set mortar to apply their tile? [937] A. Yes.

Q. All right.

Can you think of another job? A. Fannin State Bank Building, as I recall, was the thin-set method. It's a little bit difficult for me to tell you what are thin-set and what are—because we take them up to the brown coat, and other than that I really don't follow through to know whether they are thin-set or conventional sets after that.

Q. But you do at least put the brown coat on? A. We put the brown coat on.

Q. Now, could you tell me in which section of the specifications the brown coat of mortar is generally included? A. Generally the brown is included in the lathing and plastering, I mean, in the plastering specifications.

Q. And do you bid on it then? A. We bid on it then. And even in cases where it is not, and there are cases where it is not, we bid it as an additive or alternate. In other words, our base bid is x number of dollars and if we do the brown coat add x number of dollars to our base bid is the normal procedure we use.

Q. Now, how many years did you say you have been in business here or associated with this company? A. Sinee '46.

Q. Since '46? [938] A. Uh-huh.

Q. Now, could you tell me in your experience since 1946 what would be the area practice in this Houston metropolitan area for the preparation of walls with Portland cement where tile is going to be installed over them after your brown coat of mortar is dried? Which craft would you say has the area practice of installing that brown coat? A. The plasterers to my knowledge have installed it all times unless there was an argument on it, and I would say at least in ninety-nine per cent of the cases that the brown coat has been installed. I am talking about commercial work, the type of work I am involved in.

Q. Yes. A. Residences I know very little about.

Q. Yes, commercial work. You say ninety-nine per cent of it has been installed by the plasterers? A. In the jobs that I have worked on.

Q. Yes.

Now, could you tell me if you have ever had complaints from tile contractors about the workmanship that your employees do in preparing the walls for tile? A. From tile contractors?

Q. Yes. A. Yes, I have had some. It's been more prevalent, I would say, in the last, you know, few years.

[939] Q. Is there some reason for this? A. Oh, basically, and again this is a personal reason for it as far as I am concerned, to me it looks like there is a trend for the ceramic tile union to be wanting to do this work as opposed to a plastering journeyman doing it, and if there is any reason that the thing is not done exactly to their liking,

they make a mountain out of a molehill, to use an expression. But it hasn't—we haven't had very much of this. I can see a trend that way a little bit, though.

Q. Now, could you tell me whether you have ever seen tile setters, craftsmen tile setters, apply Portland cement to walls? A. Yes, I have, for the setting bed. Is that—

Q. For the setting bed of tile. A. For the setting bed of tile, yes.

Q. And you have seen plasterers do it, I assume. I don't mean the setting bed. A. Not the setting bed. I have seen them apply the scratch coat and the brown coat, yes, many times.

Q. All right.

Can you tell me from your experience in watching both crafts which craft is more skilled in performing this work? A. Well, as far as the scratch coat I don't think I have ever seen ceramic tile men ever do that. It is really done all the time by the plastering union journeymen.

[940] Q. Take the brown coat. A. The brown coat, actually that is the type of work we do all the time is wall work, and I would say that a plasterer will do quite a bit more of it, that is the type of work that he is more involved with in his every-day work. Whereas, the ceramic tile man, I would say that he does equally as good a job as we would do as a plasterer, but he is involved with floors as well as walls, and there is a little bit different knack of doing it, and I would say the plasterer is more proficient in it.

Q. He could cover a larger area, is that what you meant? A. Yes. But quality-wise I would say that they do as good a job as we would do, as far as quality is concerned.

Q. Now, getting back to a typical commercial job, say in a bathroom, would you tell me, assuming you have got both gypsum, say you have got a tile wainscoting around and then gypsum walls above that. Would that be a typical installation? A. Yes, it would.

Q. All right.

Would you tell me how your company or crews would go about doing this work in there, assuming you are going to

do the brown coat behind the tile? A. If it's over metal lath, of course we would apply to the entire wall area the scratch coat, first of all. Then we would—

[941] Q. Wait a minute. Now, you said the entire area. You mean the walls behind the tile and— A. The walls behind the tile and the plaster would be done, that would be the first thing, to scratch out the walls.

Q. It would be done in one operation, you mean? A. Well—

Q. I mean at one time you would do the whole wall? A. Well, for instance, we are involved sometimes with a complete scratch coat of Portland cement, in which the whole wall will be done at the same time, and that is generally the way we do it. There are specifications that the architect might specify a scratch coat of gypsum behind a brown coat of gypsum.

Q. I see. A. In which case we would scratch the Portland cement, then scratch the Gypsum plaster. Then the next application would be the brown coat behind the ceramic tile, and then the brown coat over the gypsum, and then a finish coat over the gypsum, and then we would be finished with our part of the installation and leave it for the tile man to do his installation. And there are times, too, according to the specifications, where the tile might precede our final coat of gypsum.

Q. You mean the white coat of gypsum, which would be your final? A. Yes, the finish coat.

[942] Q. Well, up to that, assuming the specifications call for your white coat of gypsum to be applied after the tile, would you have already put in your brown coat of gypsum— A. Yes.

Q. —and brown coat of Portland on it? A. Yes, the brown coat application would have been finished.

Q. I see.

Now, could you give me some examples of where you as a plastering contractor used Portland cement other than as a back-up for tile? A. Oh, there's many—for instance, usually on the interior and the exterior of walls of buildings

are done out of Portland cement plaster. We do a lot of stucco on the outside of buildings as far as the wall areas are concerned. We get a lot of overhangs, you know, the soffits on the outsides of buildings, which are all Portland.

Q. Are they called canopies sometimes? A. Canopies and soffits. We are extensively involved in marble-creting on the outside of a building which is all Portland cement products, in which we imbed marble chips into the final coat.

Q. Would you have it in shower rooms? A. Yes, we would have Portland cement in shower rooms. Wet areas, we use Portland cement in wet areas.

Q. Do you use Portland cement where it's going to be the [943] finished application also, in other words, without a covering of tile? A. Yes, we do. We do it both ways, you know, gypsum, for instance, Keene cement, we use as a finish coat over the Portland cement, and we also use Portland cement over Portland cement.

Q. What is Keene cement? A. Keene cement is a high calcium gypsum.

Q. What does that do, give it a hard finish or something, waterproof finish. A. It's more impervious to water than, say, the regular gypsum.

Q. I see. I believe you said you were also a lathing contractor— A. Yes.

Q. —as well as plastering? A. Yes.

Q. Does your business as a lathing contractor bring you into contact with the construction of walls? A. Yes, it does.

Q. Could you tell me how, in what manner? A. Well, generally as a lathing and plastering contractor we feel that we are wall and ceiling applicators, and we promote all the time the use of our product in walls and ceilings.

[944] Q. Well, what would you do in connection with the building of a wall as a lathing contractor? A. Well, if this were a wall here, I would probably have a door frame there and I would set up either a steel stud of channel or wire

stud of some type, put metal lath or gypsum lath on both sides.

Q. In other words, you would— A. And scratch, brown and finish.

Q. In other words, you would build the wall right from scratch, is that what you are saying? A. Right from the beginning.

Q. Including the studing in it? A. Yes.

Q. Now, do you also build, as a lathing and plastering contractor, solid partition walls? A. Yes, we do, but it's done very much the same way. We use a three-quarter inch channel as a stud, lath one side and put five coats of plaster on the walls.

Q. What is that, on both sides, you mean? A. On both sides.

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[946] Q. O.K.

Now, I show you what has been marked P-23 for identification, and I ask you if you can tell me what that is, by name. A. Well, it's the same type of specifications as this P-21 except that instead of covering, as this one does, gypsum plaster and interior lathing and furring, this regards [947] Portland cement plastering, Portland cement stucco.

Q. I see. A. And is put out by the same people.

Q. You mean— A. By the architects and testing lab, American Society for Testing Materials.

Q. All right. And the American Standards Association, is it? A. American Institute of Architects and American Society of Testing Materials. It's approved as a standard by the American Standards Association.

Q. All right.

Now, could you tell me if there is some document that you as a contractor would refer to as a standard when you wanted to check on a particular product or method of installation? A. Normally where this comes into being is in specifications as written by the architect. He tells us

that we are supposed to do a certain item, say plastering, according to the following conditions, sand has to meet specification so-and-so as described in here, the gypsum—

Q. Described in where, now? A. Described in these books.

Q. You mean the American Standard Specifications? A. Yes.

[948] Q. In other words, the architects refer you to them, is that correct? A. Yes.

Q. Would you know whether they are a commonly accepted standard for your industry? A. Oh, this is used more than our own Texas lathing and plastering specifications or even our national specifications because it's more generally known and accepted.

Q. You mean the American Standard Specifications? A. The American Standard is, yes.

Q. Do you know if they publish standards for other materials and installation of other construction? A. I believe they cover the entire range of building construction.

Q. I see. O.K.

Now, Mr. Brueggeman, I am going to show what has been marked as Exhibit P-16, has been received in evidence as P-16. And ask you if you are familiar with that? A. Yes, I am.

Q. And could you tell me what it is? A. Well, it represents a specification that was jointly worked on by the Texas lathing and plastering contractors association and ceramic tile contractors here in Texas.

Q. All right.

And were you a member of the committee that at least [949] started to work on this when you were president? A. When I was president I was an ex officio member of the committee, yes.

Q. And did you participate in any of the meetings leading up to that specification? A. Yes, I attended the one at the Ben Milam Hotel here in Houston.

Q. There was one held in Houston. A. In Houston. And one in Austin.

Q. All right.

And were there various drafts that were exchanged back and forth concerning this before the final was approved? A. Yes, there were.

Q. All right.

Now, I am going to show you exhibits which have been received, P-20-D and P-20-G, and ask you to look at those for a moment. A. Yes, I am familiar with them.

Q. All right.

Now, were those documents sent out under your direction? A. Yes, uh-huh.

Q. Both of them say that they are from you, is that correct? A. Yes.

Q. And they were sent under your direction? A. Yes.

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[950] Cross Examination

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[955] Q. All right.

Now, Mr. Brueggeman, in the last two or three years have you done more thin-sets than you did before? By thin-sets I mean more preparation of walls for thin-sets than you did prior to that time. A. In the last two years or three years?

[956] Q. Yes, in this period of time, now, that you state that this effort has been afoot, have you done more jobs where you have put in the back-up for thin-sets than you did before? A. No, I wouldn't say so. I would say that the thin-set is a little bit on the upgrade all the time. In other words, assume there was a period of fifty per cent conventional and fifty per cent, I would say we would be now up to sixty and seventy, maybe even up to eighty, in other words, going more to thin-set applications.

Q. Now, your brown coat, do you scratch it? A. On thin-set, no. On conventional we will if we know that he wants it scratched, the tile contractor.

Q. You ask him? A. As a rule.

Q. Now, getting back to this other thing we were talking about, and that is your information on the art of tile setting, do you, at the time that your men put in the brown coat, do you have available to you or are you familiar with the tile installation that is to come? A. Well, normally a plasterer foreman on the job has to read the tile specifications pretty much the same as he does the lathing and plastering. First of all, he has to find out that the architect hasn't made a mistake. He has to find out whether it's going to be thin-set. He has to find out the thickness of the tile that is going to be used. [957] And generally speaking while the general contractor superintendent gives us a lay-out of all rooms that lay-out indicates the finished wall, and we have to know pretty much how we are going to get out to there. In other words, do we leave one inch, a half inch, three-quarters of an inch? And we have to talk to the tile contractor and talk to him as to his installation.

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[958] Q. Now, as a construction man you understand and appreciate how the course of tile have to be laid out and how the joints have got to be straight and how the dimensions may be altered through the joints and in different manipulations. A. Uh-huh.

Q. Do you feel that you would be sufficiently qualified to make, to finish a wall in your brown coat with this object in view, this tile installation, without knowing all of these things that are involved? A. Well, the foreman on the job should know as much about it, say, as the ceramic tile man, who is going to make the installation, if he knows the materials that he is going, that the ceramic tile man is going to use. In other words—

Q. Does he have those available to him? Does he have the tile available to him at the time he is putting up his brown coat? A. Sometimes he does and sometimes he doesn't, but he should talk it over with the—

Q. If he doesn't have it could he finish the room properly, if he doesn't know it? A. Not unless he knows what the sytem is, he couldn't, he would have to find out.

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[961] Q. Now, do you feel that there's perhaps a greater amount of skill required in the application of this brown coat, as you call it, where it is to receive tile than where this brown coat is then for you to put on your finished plaster? A. I didn't follow that quite—if—

Q. Do you feel that there is a greater skill required in this brown coat, as you call the coat in dispute, if it is going to receive tile than it would be if you put a brown coat on this wall, which you were going to ultimately plaster? Is there as difference? A. There isn't a difference except you have to be more exacting.

[962] Q. You have got to be more exacting. Why? A. Because ceramic tile doesn't bend in any way.

Q. And you have got courses to— A. That's right.

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[965] Q. And what is the name of the coat in issue that the tile setter and the tile contractor calls it? A. Well, I am not exactly positive, to tell you the truth, because of the fact that it gets—they use a little bit of terminology that we don't use. In other words, I use scratch, brown, setting bed. Now, they have got a float coat [966] in there which to me could be either the setting bed coat or the brown coat. And frankly I don't know. Now, to me there can't be a question about the leveling coat behind a thin-set method. I don't think we have ever had a problem in this town based on that brown coat nor have we argued about that particular one under thin-set. We do get involved, frankly, I know of one at the University of Houston, I know of the problem we had at Rainbo Baking. The one at the University of Houston there was extenuating circumstances. We applied our scratch coat. We wanted to apply what we called our brown coat. The tile setter said "I don't have room for you to do it." And there was a

problem of room because the concrete stairs were laid a little bit out of kilter for our wall coming down between the two stairways. On the Rainbo Baking I don't know how the job was done. But on thin-set, where we have solid walls, we even permit tile under thin-set to go directly to another type of wall, concrete block, and so on. It goes over gypsum board every day. We just question, as far as I understand the arguments that we have been having, the leveling coat or as we would call the brown coat behind.

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[968] Q. (By Miss Thacker) Now, Mr. Brueggeman, do you always scratch your brown coat? A. No, we do not always.

Q. Are you scratching it any less now than you used to scratch it? A. Before thin-set method came into being, we did scratch what we would call our brown coat to receive a setting bed. With the advent of thin-set and whenever we have a thin-set application, we do not scratch it.

Q. Why? A. Because you don't need the scratch as far as I understand to get the bond. That is what the bonding material is doing. [969] With a Portland cement setting bed you actually need a mechanical bond. With the chemical bonding agent you don't need that.

Q. So that are you telling me that if you scratched your brown coat you couldn't apply the bonding agent? A.. Oh, no, it would just mean that you would be using more of it and it would serve no purpose.

Q. Can the bonding agent be put on thick? A. I think there are restrictions as to how thick it can be. It's put on relatively thin. Generally in the area, I would say, of an eighth of an inch as opposed to three-eighths.

Q. But generally in order to apply the bonding agent you have got to have a smooth surface? A. You don't have to have a smooth surface as far as I know. Again this is getting in the field beyond me. This becomes—

Q. Well, you are a plastering contractor and brown coats

are generally scratched, aren't they? A. No. For instance, in plastering brown coats are not scratched.

Q. Well, now, Mr. Brueggeman, are you aware of the green book? A. Yes, I am aware of the green book.

Q. You are familiar with this 1917 agreement? [970] A. Yes, we referred to the 1917 agreement when we discussed this specification that we had.

Q. So then you know what it says? A. No, I don't know exactly. I would have to refer to it to know what it says.

Q. Well, would you read it over to yourself while I am finding something? A. (Witness complied.)

Uh-huh.

Q. What does this agreement have reference to? A. It has reference to who does what in the application of ceramic tile under the conventional set.

Q. Well, what does this say right here (indicating)? A. Preparation of walls and ceilings to receive tile.

Q. And who is this agreement between? A. Between the O.P. & B.M.P.I.U.

Q. Do you know of any other agreements the two crafts have made? A. No, I don't know of any other that the two crafts, themselves, have made. There may be others, but I am not familiar with them.

Q. Now, insofar as the work of the plasterer is concerned, does it say how many coats he has? A. It doesn't mention any number as far as I can read here.

Q. It doesn't say whether he has had one coat or two coats, [971] does it? A. No, but it implies, at least, one more coat than one.

Q. Where does it say that, Mr. Brueggeman? A. Well, because it says they shall plumb, rod and square all walls.

Q. Well, now, where does it imply that there is to be a second coat there? A. Because you cannot do this in a scratch coat. You need a firm backing of some type. That is the purpose of the scratch coat, to give you a firm backing on which you can square out a wall and plumb

it. You cannot possibly do it in a scratch coat. It's wet material. It wants to run down the wall. And we have to have a firm backing so that you can rod or plumb or square a wall. It's just not possible to do it with a scratch coat. When we get finished with a scratch coat there are variations of at least three-eighths of an inch, and that is why the second coat is required for plumbing. With a wet material you can't square a wall.

Q. What does it say the tile setter is to do? A. Actually the way I am reading it it doesn't tell him to do anything.

Q. Does it say what coat he is to put on? A. They shall plumb, we are talking about plasterers; plumb, rod and square walls and scratch the same so as to guarantee adhesion of the final coat. The final coat would [972] be put on by the tile layer.

Q. All right. A. Uh-huh.

Q. Now, would there be anything wrong with him doing the final plumb, rod and square? Is there anything in there that says he can't? A. Well, it says here the O.P. is supposed to plumb, rod and square and the tile layer shall put the final coat on, which would be the setting bed or mechanical, I mean, the chemical adhesive, thin-set method.

Q. Well, now, you see, the reason I am asking you this is that you tell me that it's tacit in this agreement that the plasterer has two coats, is that correct? A. When it goes over methal lath he has to have two coats.

Q. Is there anything in here that says it's over metal lath? A. No.

Q. All right.

You tell me, though, that it's tacit that he has two coats, the plasterer has two coats. A. When it is put over metal lath he has to have two coats in order to plumb. Now, over a concrete block wall or a masonry well he would only need one coat, which would be the plumbing and rodding and squaring of all walls.

Q. Now, does it say in here what the final setting bed that [973] belongs to the tile setter, what is to be done to it? A. It just says the final coat shall be put on by the tile layer to act as a bed for his tile.

Q. And it doesn't say anything about what he is to do to it, does it? A. No, it doesn't, as far as I can read.

Q. All right.

Then the final responsibility, then, rests with the tile setter, doesn't it? A. He has to in most specifications guarantee the workmanship on his, of his job, but at the same time most specifications carry a clause that all walls shall be inspected by him prior to installation, and if there is anything wrong with them call it to the attention of the architect.

Q. Yes. A. Which is normal in most relations between subs.

Q. Now, would you think that in the installation of his final setting bed that then he would do the final plumb, rod and square, to remove all inequalities? A. On conventional he would have what he would call his setting bed, and I would call his setting bed, that would act as a setting bed for his tile, and at that time he can, if he—he will do it with, oh, wooden lattice strips, and so on, or metal lattice strips. He can.

Q. Then—

[974] Mr. Capuano: Let him finish, please.

A. He can do it.

Q. (By Miss Thacker) Would it matter, then, whether the plasterer would plumb, rod and square it if he is going to do that? A. On a conventional set the work of the plasterer wouldn't have to be as accurate for conventional as it would for, say, thin because there is another opportunity to pick up any differences with his bedding coat.

Q. Then the plasterer wouldn't have to put on two coats, would he? A. Well, again, yes, he would. On metal lath he would have to put on two coats, a scratch coat in order to stiffen up the wall that he could put

on the coat that would square, plumb—what other terminology do they use?

Q. Rod. A. Plumb, rod and square.

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[976] Q. (By Miss Thacker) Now, Mr. Brueggeman, do you see any difference in this original agreement, as we have here in the green book—I note this agreement in the green book is between unions. These two letters are the views of a few men—

Mr. Capuano: Oh, now stop characterizing that, would you?

Q. (By Miss Thacker) —of the Joint Board.

Mr. Capuano: Just ask him questions about it.

Q. (By Miss Thacker) Now, do you see any differences in these decisions, these two decisions, in the original agreement? A. I can't see.

Q. You can't? A. No.

Q. Well, let's go over it, now. Let's look here at the agreement. It says here—what does this say here as to the plasterers? A. They shall plumb, rod and square all walls and scratch the same so as to guarantee adhesion of the final coat.

Q. All right.

Do you see in here anywhere, either one of these two decisions, where it says the plasterers are to do that? Show [977] me. A. Well, it says here in the thin-set method of applying tile to walls and ceilings, the plasterer shall apply the first and second coats of mortar, that is, the scratch coat and plumb coat. The plasterers shall plumb, rod and square all walls. They are using the same terminology here.

Q. Do they say scratch? A. Plumb, rod and square. Plumb, rod and square.

Q. And what? A. And scratch.

Q. Do you see it here? A. No, but they are referring to a thin-set here in which you don't have to scratch.

Q. Does this agreement have anything to do with the thin-set? Does it say anything in here about the thin-

set? A. No, the thin-set was not in existence back in 19—what is that, '17?

Q. That's right. A. Yeah.

Q. I know it wasn't.

But this is the conventional method, isn't it? A. That is conventional.

Q. All right. A. And in the conventional method you do have to have a mechanical bond. In other words, that is why we scratch in the [978] plaster. That is why we scratch, you know, the brown coat here. Portland to Portland you have to have a mechanical bond.

Q. With the scratch? A. With the scratch. That is what that scratch is, to furnish a mechanical bond between the two Portland cement applications.

Q. All right.

And is that the reason for the scratching, so that he can put on his final coat? A. So that his finished coat, I mean, final coat or bed setting coat—

Q. Yes. A. —will mechanically bond to the brown coat that has been applied.

Q. All right. That has been deleted here. A. He has been referring, as I see this letter, only to thin-set. I don't think he is referring to conventional.

Q. Do you know of any agreement that the two unions have had on thin-set? A. I know of no agreement other than this.

Q. Other than this. A. In other words, this is exactly like that. I think you are making an issue of this word scratch.

Q. That is one of them. [979] A. As compared to what we refer to as our first coat being scratched, this is referring to the scratching of the brown coat, so that there is a mechanical bond between the two coats of Portland cement plaster.

Q. All right. Then the brown coat is your second coat? A. The brown coat is our second coat.

Q. All right.

And you scratch it so that then the tile setter, when he puts his coat on there will be a mechanical bond? A. When he puts on his Portland cement setting bed coat, which is in normal applications roughly three-eighths of an inch thick, as opposed to a thin-set, which is roughly an eighth of an inch or maybe less, it's a chemical bonding agent as opposed to a mechanical bond that is required.

Q. Now, does it say anything here in this 1917 agreement about what the materials are that the plasterer uses? A. It is agreed that the plasterers shall use only sand and cement in the preparation of the work above stipulated.

Q. Does it say anything about what the tile setters should use? A. I don't see it if it does. Does it say it here somewhere that I don't read?

Q. No, I haven't seen it. A. No.

Q. There is nothing in this 1917 agreement, then, that [980] alludes to the thin-set method? A. Not as far as I can see.

Q. So then this is the thinking of the Joint Board on what the crafts should do; is that correct? A. No, they are interpreting that to a new condition.

Q. To a new condition? A. To a new material, rather than a new condition.

Q. To a new material? A. Uh-huh.

Q. All right.

Then are they changing anything in it? A. I don't think they are.

Q. They have eliminated scratch. A. They eliminated the scratch, word scratch there, because here they were dealing with Portland cement. Here they are dealing with a chemistry bond, a chemical bond..

Q. Now, look over here on this March 15. Do you see any—do you say this is exactly the same as the agreement? A. I haven't noticed a difference. There may be one that I haven't been able to weed out, but I can't see it.

Q. What about this second paragraph here? A. It's

telling him, it's telling the tile journeyman that if he sets his tile the same day he can do this work.

Q. He can't, he cannot do it? A. No, he can.

[981] Q. If he sets it— A. If he sets it the same day.

Q. Is there anything in this 1917 agreement which limits him or tells him when he can set his tile after he puts on his setting bed? A. Not to my knowledge. It may be there. Let me read.

I think this is something that was given to him at some period between 1917 and the present date.

Q. What do you mean given to him? A. As between the two unions as to an agreement to let him do this brown coat work or float coat work or bed setting work, if he covers it up with tile the same day.

Q. Now, you are saying you think this is an agreement between the two unions? A. This is something that at least in this area that is recognized by all of us as being their work if it's covered up the same day. Area practice, I should say. I am not sure what it is nationally. But it's been our area practice to let the tile setter do it all if he is going to—

Q. Well, now—

Mr. Capuano: Let him finish his answer, please.

Q. (By Miss Thacker) Now, you are saying—

Mr. Capuano: No, let him finish his answer.

Q. (By Miss Thacker) You are saying that the tile contractor—

[982] Hearing Officer: Wait a minute.

Q. (By Miss Thacker) —then—

Hearing Officer: Wait a minute.

Read that question back prior. Let him finish his answer.

(Record read.)

A. Cover it up the same day.

Hearing Officer: It's area practice, then, so far as you are concerned, to let the tile setter do the work so long as he covers it up the same day?

The Witness: That is what I conceive our area practice to be.

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[987] Q. (By Miss Thacker) Now, does this mean that he can't put it up if it's dry?

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A. My interpretation of what Bill Cour is saying here is that the tile setter can apply the cementitious materials behind his ceramic tile if he does that cementitious work the same day that he applies the tile. That is my interpretation of his wording.

Q. All right.

Then that means that it's wet, that the setting bed, that it's wet? A. What are you getting at, wet?

Q. What he is putting the tile on. A. I don't think it has any significance as to whether it's wet.

Q. Well, now, if he says he can't do it except the first [988] day, would it be dry after that? A. It would be dry after that and the bond would be lost.

Q. What bond would be lost? A. Well, I don't know—this is his letter, but I do know, and all ceramic tile people and plasterers know that you get a better bond if you go over a second coat the same day.

Q. What is this again, now, the second coat? This is your coat? A. No, I am referring to any type of cementitious material, whether it's done by a cement finisher, a tile setter or a plasterer, that you get a better bond when you go over it, it's more monolithic.

Q. You mean when it's wet? A. When it's wet.

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[989] Q. (By Miss Thacker) Well, you qualified yourself certainly as a plastering contractor and an expert on plaster. Now, then, in your operations where you have got a plasterer involved, and you have put on your brown coat, which is your gypsum coat— A. You are talking to me as a plastering contractor, doing plastering?

Q. Yes, I am talking to you as a plastering contractor, and you have put on your brown coat which has gypsum in it, usually, doesn't it? A. Uh-huh.

Q. Suppose you are doing, then, a picture mold or a ceiling mold or an ornamental mold, can you put your white coat on when your brown coat is wet? A. You are talking now about gypsum plaster?

Q. Yes. A. If I am putting on the finish coat of plaster, gypsum plaster, over gypsum plaster, it is better for me to do it [990] while the brown coat is still wet.

Q. You can do— A. If I am putting on a finish coat that is a hard troweled surface, I should do it after the brown coat is dry, thoroughly dry.

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[992] Q. Now, you know that as a plasterer, don't you, that in this second set of situations, this second set of facts, that you can't put on your white coat when your brown coat is wet and successfully, don't you? A. I know what good practice is, let's put it that way.

Q. Yes. And you know there are certain things that are involved that you can't do it, don't you? A. To get a representative job.

Q. All right.

Do you think somebody else should come in and tell you, Mr. Brueggeman, that you have got to do it when it's wet?

Answer it. A. I have it done every day to me.

Mr. Capuano: He has given you an answer.

Q. (By Miss Thacker) By whom? A. By the general contractor.

Q. What happens then when you do it? A. I follow his instructions.

Q. What kind of a job do you have then? A. I have a good job, but I have to change my operation in doing it, that is all.

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[998] Q. Did you have any representatives at this meeting from the two crafts involved? A. Oh, let's see, I am just trying to think. I don't know for certain. I was here in Houston in the Ben Milam Hotel as part of our committee, made up of lathing and plastering contractors, meeting with a committee from the ceramic tile contractors, and there was a man introduced to us, and I made the minutes of the meeting, I made notes, I didn't copy verbatim word for word, but Mr. Young was intrduced to me as one of the tile setter representatives from Oklahoma. And other than that I don't remember the man. But I do know that the man represented to me, represented himself as being with the tile union and from Oklahoma. Other than that I couldn't—

Q. Did he participate in any of the sessions? A. To my knowledge, no. He was here on other business.

Q. He did not? A. And observed what we were trying to do in Texas.

[999] Q. Then you got together this guide without any real consultation with the two crafts, isn't that right? A. I would say that is correct.

Q. You would say that. A. Yes.

Q. Were you aware of this agreement between the two crafts? A. We used this as a guide. In other words, when we tried to draw up—may I have a copy of that?

Q. Yes, surely. Here it is, P-16. A. To the best of my knowledge we used this green book and area practice and tried to develop a combination of exactly what was going on at the present time. It was not anticipated that we were changing, really, anyone's jurisdiction.

Q. Who were the members of the Tile Contractors on this committee? A. Who? I remember Mr. Love, Mr. Montgomery. I believe Adolph Martini sat in the meeting here in Houston or was there for a while.

Q. Did Mr. Love and Mr. Montgomery have any interest other than as tile contractors? A. I have no idea what their particular interest was.

Q. Are they manufacturers of L.&M.? A. I believe they are tile contractors. I am not positive of this.

[1000] Q. They. had a product to sell, L.&M.? A They didn't have a product to sell to us, no.

Q. But they were on the committee that set up these guide lines, two manufacturers of a bonding agent? A. Yes, they manufactured L.&M. and they were both on the committee sent to us by the Ceramic Tile Association. Why they were picked by them I don't really know.

Q. Do you know if the guide before it was finalized was sent out to all of the members of the Tile Association and approved by the membership? A. Oh, after it was approved by our committee I believe our contractor sent the thing out for perusal by all of our members.

Q. Of your members? A. Yes. Now, what they did on their side of the fence, all I ever knew about it is that later we did receive from them a signed copy and a letter that was thanking us for assistance in the matter.

Q. But you don't know what action was taken— A. No, I don't know.

Q. —in their association? A. No, I don't know.

Q. Now, Mr. Brueggeman, I believe you said that in connection with this area practice that you state in the tile, in connection with the tile installation, your source of [1001] information was your own men, is that what you said? A. Our source of information was our committee as set up by the Texas Lathing and Plastering Association. We picked, as I recall, a man from the Valley, a man from Beaumont.

Q. Of your own association? A. Of our own association.

Q. Then you don't have any direct knowledge of the practice in the tile industry from tile contractors? A. Do I personally or—

Q. Yes. A. No, sir.

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[1002] Q. Can you tell me what any tile contractor has told you what his practice is? A. The people who sat down with us in this meeting told us. Were in agreement as to what the practice in the area was.

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Q. But you haven't had this information of what area practice is given you by any particular tile contractor that [1003] you can name? A. Well, the people who sat in on the meetings—

Q. They were manufacturers, you told me.

Mr. Capuano: Now, that is not accurate of his testimony.

A. Two manufacturers.

Q. (By Miss Thacker) Yes. A. Two of them. Well, actually they are tile contractors, to my knowledge.

Q. Yes. A. They represented themselves, that is what they represented themselves as being, now. Other than that I didn't go up to their place of business and actually go and look at their jobs. They said to me, "I am a tile contractor," and from what I knew of them they were tile contractors. They also manufacture, two of them did, materials used in tile application.

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[1007] Redirect Examination

Q. (By Mr. Capuano) Could you tell me, Mr. Brueggeman, whether, since this agreement, specification, guide specification, P-16, has been in existence, whether it has in fact been followed at least in the Houston area here by architects? A. Well, all the architects in Houston were given one or more copies of this as a guide, and I would assume that they are using it because most of the specifications adhere very closely to the way this is set up.

Q. Thank you.

Now, in the thin-set method or when one of these dry-set mortars is going to be used in the thin-set method, does your brown coat have to be plumb? [1008] A. On the thin-set?

Q. Yes. A. It has to be plumb, yes.

Q. And it had to be plumb in the conventional method, right? A. Right.

Q. And what does plumb mean? A. It has to be flush up and down.

Q. Straight, in other words? A. Straight.

Q. And level means horizontal, is that right? A. Yes.

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[1009] Q. Now, let me ask you this. On, for example, metal lath, when tile is going to be installed in a thick mortar coat, you will put on a scratch coat and a brown coat, correct? A. Yes.

Q. Then the tile setter will put on the thick mortar coat, is that correct? A. Yes.

Q. And what is that called? A. To me it's a setting bed.

Q. All right.

Now, the thin-set method has come in, right? A. Uh-huh.

Q. And take the same situation, over metal lath you will put on a scratch coat and a brown coat, correct? A. Yes.

Q. And then the tile layer will put on another coat and then his tile, correct? A. He will put on the chemical bonding agent or whatever you want to call it.

Q. What would that be called, the coat he puts on? A. It's the setting bed.

Q. The coat he puts on? A. Yes.

Q. Now, on the thin-set method over concrete walls or masonry of some sort, you would put just a brown coat, is [1010] that correct? A. Just a brown coat.

Q. And then the tile layer would apply one of the thin-set mortars and his tile, is that correct? A. Yes.

Mr. Capuano: I don't have anything else.

Recross Examination

Q. (By Miss Thacker) Did I understand you just now, Mr. Brueggeman, to call the bonding agent the set-

ting bed for the tile? A. Well, as far as my recollection of what we are doing, and again over metal lath, we apply a scratch coat. The next thing we apply is a brown coat. Then there's two ways of adhering to our brown coat, that is, either with conventional set, which requires Portland cement to bond, and to bond to our brown coat, or a chemical, such as L.&M. thin-set or whatever the material might be called, also serves the same purpose as that Portland cement setting bed, so it would be a setting bed.

Q. What is the source of your information that the bonding agent and the float coat put in by the tile setter is one and the same? A. They are not one and the same because they are different materials, but we have two coats that we do, the scratch and the brown. The tile setter either puts on Portland cement, [1011] which you could call a setting coat, or he puts on a chemical bonding agent, which could also be called the setting bed, in other words, that is what sets the tile to the brown coat. That is the terminology I am using.

Q. Do you know any tile contractors or tile setters that call the bonding agent a setting bed?

Mr. Capuano: Now, I am going to object to that. I can't possibly see the relevancy of that, whether they do or they don't call it that. She asked him his opinion and he told her.

Hearing Officer: I will overrule your objection. If he knows he can answer.

A. What was the question again? I didn't quite follow it.

Q. (By Miss Thacker) Have you ever heard any tile contractors or tile setters call the bonding agent the setting bed for the tile? A. No, I haven't.

Q. Where did you get the term, then, or why do you call the bonding agent the setting bed? A. Well, because the two are serving the same purpose. They are both bonding tile to our brown coat.

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[1013] Q. Now, you put on your brown coat. The tile setter puts on his float coat or his setting bed. Does he put the tile directly onto that? A. If he is in the conventional set, when we finish our brown coat, he then puts on, in conventional set, about three-eights of cementitious material, Portland cement, or masonry cement, and he applies his tile to that.

Q. Without any bonding agent? A. He is not using a chemical bonding agent. That to me is the bonding agent.

Q. All right. This is the conventional method? A. Conventional, yes.

Q. All right.

[1014] Now, then, in the thin-set you are calling the bonding agent the setting bed, is that correct? A. It's serving the same purpose as that three-eighths inch Portland cement.

Q. In your opinion? A. In my opinion.

Q. Now, I believe you said that in area practice that the architect's specs. primarily had the bids going to the plastering contractors for the brown coat on thin-set. Is that your statement? A. That is my statement.

Q. Do you see all of the architects' specs. that's made in this area? A. I see every bit that we make as we make it, and before we make it, and in all cases where they are in our specs., where the brown coat, and I am using our terminology, is in our specifications, we bid it.

Q. Yes. A. Now, when we find that it is not there, we go looking for it, and if we find it in the ceramic tile specifications, we bid it as the specifications say, our base bid is x number of dollars, but you have the brown coat in the ceramic tile specifications. We think that the plasterer will have to do it, and such being the case, if you want us to contract for it, add x number of dollars to our base bid.

Now, I don't look at the specifications, but I would [1015] say that at least ninety-five per cent of the time it's in our base bid.

Q. Of the ones that you see? A. Of the ones, of the jobs that I bid.

Q. But you don't see all of them in the area? A. We have three estimators that cover about ninety per cent of the work that is done in the plastering business. In other words, if there is ceramic tile in a job that involves plaster, then we see ninety per cent of them.

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[1016] Q. I see.

Will the tile go on, Mr. Brueggeman, if the bonding agent isn't put on or if it isn't buttered? A. I don't know.

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[1017] MARION LINDER SAYLORS

was called as a witness by and on behalf of the Plasterers and, having been first duly sworn, was examined and testified as follows:

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Direct Examination

Q. (By Mr. Capuano) Mr. Saylors, could you tell me who your employer is, please? A. Mr. K. F. Doerner.

Q. Is that the Doerner Plastering Company? A. Doerner Plastering Company.

Q. And what is your position with Mr. Doerner? A. I am Mr. Doerner's superintendent, field superintendent.

Q. All right.

And are you a plasterer by trade? A. Yes, I am.

Q. And how many years have you been in the business? [1018] A. Approximately nineteen years.

Q. O.K.

Now, in connection with your work as a superintendent do you regularly visit jobs that Doerner is working on? A. Every day.

Q. Every day. All right.

Now, have you had under your supervision jobs where walls have been prepared to receive tile? A. Almost every day.

Q. All right.

Now, could you tell me the name of some of the jobs that you have been on which have included the preparation of walls to receive tile, particularly with Portland cement first? If you have got jobs where gypsum was used, just distinguish them for me. A. Well, most of mine is with cementitious material.

Q. Portland? A. Portland cement, yes. And we or I had supervision over the St. Anthony Home for the Aged, the Diagnostic Clinic.

Q. Is that all one job? A. No, there's two jobs.

Q. All right. Let's take the St. Anthony job. When was that, approximately? A. Oh, we finished it up six to eight months ago.

Q. All right. Was that in the Houston area here? [1019] A. Yes, it is.

Q. And what did you do on that job, the plasterers, I mean? A. Scratched and browned.

Q. And tile was installed over that? A. Tile was installed.

Q. And do you know how tile was installed over that? A. On a setting bed.

Q. All right.

Do you know what type of setting bed was used there? A. Oh, I am not, the trade name I am not sure of. It was one of the bond, the setting bed materials that they use now.

Q. These thin-set? A. Yes, thin-set, L.&M., Crest, Kaiser, one of the trade names.

Q. I see. A. I don't know specifically which one was used to install the tile.

Q. All right.

Now, and you say the plasterers did the scratching and browning there? A. Yes, they did.

Q. Where did you have this wall preparation, in other words, what areas of the— A. Well, in all of the bath areas, and there was one to almost every room, and the morgue and wherever tile was used.

[1020] Q. All right. A. In the kitchen area, a tremendous amount in the kitchen area.

Q. O.K.

Now, your brown coat, let me ask you this, in relation to the time or the date you put your brown coat on, when did the tile setters apply their setting bed and tile? A. Well, they started about three months after we got the first one browned.

Q. O.K. What was the other job you mentioned? A. The Diagnostic Clinic.

Q. Where is that? A. That is on Main.

Q. Here in Houston? A. Yes.

Q. When was that job, approximately? A. Well, along about the same time, somewhere, give or take a month or two, about six months ago.

Q. All right.

And was the type of installation basically the same as you just described? A. Basically the same, yes, sir, in regards to what the plasterer did it was the same.

Q. It was the same? A. It was the same.

[1021] Q. Was tile installed then with one of the thin-set materials? A. Yes, same day.

Q. All right.

Can you think of another job? A. Rice Kitchen.

Q. Rice Kitchen? What is that? A. A kitchen for Rice Institute, which was—

Q. Was this— A. A very large tile job.

Q. Was that a separate building, this kitchen? A. Yes, it's a building in itself.

Q. All right.

And it was a large tile job there, you say? A. A large tile job.

Q. And what preparation did your plasterers do on that job? A. We scratched and put the brown coat up plumb, square and true.

Q. And then the tile setters applied their tile? A. Then the tile setters come in some weeks after we had started and put their tile in.

Q. With the thin-set again? A. Yes.

Q. All right. Can you think of another job? A. Savoy-Field.

[1022] Q. That is a hotel? A. That is a hotel.

Q. Approximately when was that? A. Oh, about four months ago I think we completed that.

Q. And could you tell me, was that installation similar— A. The installation was the same.

Q. O.K.

If you can remember the name of the tile contractor on any of these jobs I would appreciate your mentioning it. A. Mr. Martini on the Casa de Maria, which is the St. Anthony. Mr. Martini on the Diagnostic Clinic. I am pretty sure it was Mr. Martini on the Rice Kitchen.

Q. O.K. Any other jobs you can think of offhand? A. Oh, yes, we have got four or five going presently. We have got NASA Building No. 37. We have Foley's.

Q. All right. Let's take NASA Building now. Is the installation there the same or— A. It's yes, we are scratching what metal lath is there, and then we are browning all of it in its entirety, and the tile setters are coming with their bed coat, putting it direct. It's thin-set method bed coat.

Q. And what is this, Foley's, you say, now? A. Foley's.

Q. What is that job? A. Now, the tile setter hasn't started. I have browned about [1023] half of the bathrooms but the tile setter hasn't started yet.

Q. All right.

Same method of installation? A. Same method of installation. We are waiting for the bricklayer to complete his work at the present time.

Q. Then they are going to put their tile directly over your brown coat with this thin-set method? A. That's correct.

Q. And what is another job? A. The University of Houston Engineering Building which we finished up to the last month or two.

Q. Is that the same method? A. Same installation.

Q. And do you recall the tile contractor on that job? A. Which one was it?

Q. The Engineering Building. A. Engineering Building? Martini.

Q. O.K. Can you think of another job? A. Texas Southern University.

Q. What did you do there? A. Scratch and brown, plumb coats, for the tile setter.

Q. And was that a particular building at Texas Southern? A. It's the Library Building addition.

Q. O.K. When was that job, approximately? [1024] A. A year, maybe.

Q. Same thing, the tile was going to be installed thin-set? A. Right.

Q. Can you think of another job? How about Luby's Cafeteria? A. Yes, Luby's Cateteria.

Q. And is that here in Houston, too? A. That is here in Houston.

Q. Was that about 1965? A. Somewhere around there, yes, sir.

Q. And was that installation the same as— A. Same basic installation.

Q. How about Methodist Hospital, do you remember that? A. Yes. That was a rather large tile job that we did. I am not certain. I believe it was Martini on that job, too. I am not certain. I couldn't—

Q. Well, that is all right. Was that in about 1965, too, here in Houston? A. Yes.

Q. Pardon me? A. Yes.

Q. Did you perform the same work as you described? A. The same work, put the plumb and scratch coat up for the tile.

Q. O.K.

How about the Olson Building, do you remember that? [1025] A. The Olson Building, yes.

Q. Is that here in Houston? A. Yes, it is.

Q. Where did you have the back-up for tile then? A. In the bathroom areas.

Q. O.K. Is that an office building? A. Office building over on Kirby.

Q. Approximately when was that? A. That's about a year or so ago.

Q. O.K. And the method of installation? A. Scratch and brown for the tile setter.

Q. On some of these jobs did you have wire lath in all of them? A. No, I am sorry, did you want me to identify the fact that they did have metal lath or whether they were on masonry or what? Some of them—pardon me.

Q. That is all right, go ahead. A. When you have masonry you also most generally have chases and things that you have to furr with metal lath, which you could have a combination of both in all of these instances.

Q. All right, sir. A. Quite a number of them have spe-specifically metal lath.

Q. So, in other words, you would have how many coats, if you had masonry, how many coats would you have? A. Well, one coat, one plumb coat.

[1026] Q. I see. Then two on the metal lath, is that what you are saying? A. That's right.

Q. O.K. How about Pittsburgh Plate Glass, do you recall that? A. Yes, that is—

Q. Is that in Houston, too? A. Yes.

Q. What was that, an office building? A. No, it's an addition to their—well, yes, I am sorry, it is, it's an addition to their office building.

Q. Approximately when was that job? A. Oh, about six months ago.

Q. All right.

And the same type of installation that we have described? A. Same type of installation.

Q. Do you recall who was on that job, the tile contractor? A. No, we had cleaned up and left the job, I think, before the tile contractor ever got there.

Q. O.K.

How about Rohm & Haas Chemical Company, do you recall that one? A. Uh-huh, that was a job down on the Ship Channel that we did.

Q. Is that here in Houston, too? [1027] A. Well, in this area.

Q. O.K. And approximately when was that? A. Two years ago, possibly, something like that.

Q. Same type of installation? A. Same type of installation.

Q. How about St. Thomas Biology Building, do you recall that? A. Yes, uh-huh, that was on masonry, I remember that, that was at the University of St. Thomas.

Q. Is that in this area, too? A. In this area.

Q. Approximately when was that? A. About a year and a half.

Q. How about Texaco Office Building? Oh, excuse me.

How about A & M College? A. Uh-huh, we just, oh, about six months ago completed that.

Q. And is that in this area, too? A. Well, yes, that is at Bryan and College Station, about ninety miles from here.

Q. Oh, is that within the jurisdiction, do you know— A. It's within this jurisdiction.

Q. O.K. Same type of installation there, too? A. Same type of installation there.

Q. How about the Humble Research Addition? [1028] A. Yes, that is at the Humble Research Lab, and it was the same installation.

Q. And is that in this area, too? A. Yes, it is.

Q. And approximately when was that job? A. About a year.

Q. And on all these jobs the plasterers did this browning? A. The plasterers did the preparatory work for the tile.

Q. All right.

These are jobs you have done for Doerner? A. Yes, for Mr. Doerner.

Q. How about the Center Pavilion? A. Yes, that is a remodel job that we did that was about four or five floors, and we had to do the scratch and brown for the tile there.

Q. And when was that approximately? A. Well, we did two different jobs for them. One of them we finished about four months ago. The one prior to that we did about a year or so ago.

Q. Same type of installation? A. Same thing, yes.

Q. How about Humble Service Center, H.L.&P.? A. Yes, that is at Tumble, Texas, in this area.

Q. It's what? A. It's at Humble, Texas. It's Houston Power and Light [1029] Company auxiliary building, and we lathed, scratched and plumbed for the tile setter, brown coat and plumb for the tile setter.

Q. Is that within 79's jurisdiction, too? A. Yes, uh-huh.

Q. How about the Houston Club? A. Yes.

Q. What was that job? A. It was remodel of the eighth, nineth and tenth floors.

Q. And when was that, approximately? A. It's kind of finishing up now. We have got a little more work to do down there.

Q. Do you recall who the tile contractor was on that? A. No, I really don't, to be truthful.

Q. Can you recall any other jobs where you did the backup for tile other than when you were employed by Doerner? A. That is calling on my memory pretty good, but I was with Mr. Duckett for, associated with him for about seven years, and we did First City National.

Q. What is that, an office building? A. And schools. I beg your pardon?

Q. Is that an office building, First City National? A. Yes, it's an office building.

Q. Here in Houston? A. Uh-huh.

[1030] Q. What type of installation did you have there of the tile? A. Well, basically all these things I am tell-

ing you were where we scratched and browned preparatory for tile.

Q. All right. Tell me, can you think of any other job by name while you were working for him? A. There were so many of them, you know what I mean, after so long a time they just run together. I mean —

Q. You have had others, though? A. Oh, yes, the Towers, Bank of the Southwest Towers, repair work over at Memorial Professional Building.

Q. Both of those were the same type of preparation, too? A. That's right. School jobs, you know, the names, I know the locations and everything, but as far as putting a name to them I can't.

Q. That is all right. I understand. O.K. A. Oh, a couple of Spring Branch High Schools. This is when I was with Mr. Duckett.

Q. O.K.

Now, have you during your nineteen years experience, have you ever seen tile setters apply a mortar setting bed in the conventional method? A. Yes.

Q. And how thick would they normally apply the mortar setting bed in the conventional method? [1031] A. Normally, I would say, about three-quarters of an inch, sometimes. I mean, if you are talking about they are doing it conventionally, is this what you are saying?

Q. Yes, conventionally. A. They do it about three-quarters of an inch, whatever it takes when they strip it out and set it.

Q. And you, of course, have seen your plasterers install your brown coat, is that correct? A. Yes, that's right.

Q. Now, could you from your experience give me your opinion of the comparative skills of the two crafts in the installation of the mortar coat, that is, the plasterer's brown coat and the tile setter's conventional setting bed. A. The two skills between the two crafts?

Q. If one craft is better than the other or— A. Well, we are not confined with just using a level and a square

in a bathroom. We have to use it on jobs in other places, cabinets and so forth and so on, where they are going to have cabinets installed later. Our men use a hawk and trowel eight hours a day.

Q. You are talking about plasterers? A. Plasterers. When I say our men I am talking about plasterers. And I think just the fact that they use the tools more would make them some little bit more proficient with the use of the hawk and trowel and possibly a level [1032] and a square.

Q. All right.

How about with regard to the speed or the amount that can be covered in— A. I believe because of the continued use of tools plasterers just can get over it faster and do just as good a job. I mean, they are used to handling mortar all day long, not handling mortar for, say, two or three hours and then stopping and setting tile for the rest of the day. Elimination would just almost declare that to be a fact.

Q. Now, on the jobs where you have been the superintendent have any officials of the tile layers union or any members of that union ever claimed from you the installation of your brown of mortar? A. No, they haven't.

Q. Now, could you give me the method in which, describe for me how your plasterers would install a brown coat of mortar on, say, a masonry wall? A. You are talking about in relation to setting tile on it, preparatory to setting tile or just—

Q. Yes. A. Well, we will assume, then, it's possibly in a bathroom. Well, there are several factors to be taken into consideration when you go to setting or browning for a tile setter. The plumber has got certain receptacles, pipes and so on, [1033] and so forth, that are protruding from the wall, and he has to have a fixed location for the setting of his plumbing fixtures at a later time, after the tile is installed. So we have to acquaint ourselves with what his needs are, the reveals that are going to be on the door bucks, we have to

acquaint ourselves with that. We have to acquaint ourselves primarily, or first, I should say, with the thickness of the tile, what is going to be the requirements as far as the tile setter is concerned, how much is he going to have to have for the total thickness of his setting bed and his tile, and the dimensions of the tile, and then we go in there with this information, we go in there and lay our screeds out and fill them in, rod it, level, square it, just check it from every aspect.

Q. All right.

Now, when you go in to do this, are these pipes that you talked about already installed? A. Yes, we run into trouble sometimes when—I have lathers under my supervision sometimes, and when we go to a job everything that is on the print isn't exactly in the same relation, somebody could have had a larger pipe, maybe, or location was changed, and we have to work back from there.

Q. How about door bucks, would they be installed when you started installing the plaster? A. The door bucks could or could not be, but this door buck [1934] is generally set by the general contractor, and he is charged with the responsibility of the location of the door buck.

Q. How about things like window frames, would they be set when you started? A. Well, they, yes, they could be set when we start or a lot of times our tolerances are such that we have to work and then you just slip a prefabricated window into place. With everything with of-the-job fabrication, different things occur at different times. In our business nowhere is there just a set rule now that a person can go by because they have to adopt theirself to every job.

Q. You say prefabricated windows that they slip into place. What do you mean by that? A. Well, there's a lot of time that the plastering work is complete and they will just set a whole unit in and tie it in and calk it.

Q. Well, will you have to know whether it's going to be prefabricated when installed, when you are putting up your work? A. Yes, you would have to know that. You

would have to make an allowance for them to just put the window right in place.

Q. I see.

Are there any other prefrabricated products? [1035] A. Cabinets, they make these cabinets, they have got fixed dimensions on marble tops. They have to just fit right in place. These things are mostly made by cabinet shops completely off of the job and are brought in truckloads and then set on the job to be put in place.

Q. Then they have to be set right in the wall? A. Right in the wall, and they have to fit.

Q. All right.

And when you are installing your brown coat, then, do you take these things into consideration? A. These things all have to be taken into consideration. In the event that there is something wrong on the job, if there is a chase out, then you have to go to the job superintendent, talk it over with him, maybe he will even go to the architect, get the information from him to move these walls, to take all this into consideration before you can do your preparatory work for the tile.

Q. When you go on a job are there any room dimensions that you must meet besides this prefabrication business we talked about? A. Yes, there's room dimensions given on most all of your architectural plans.

Q. And what do they disclose, those room prints? A. Well, in the toilets you will have toilet partitions. You will have towel holders. All these dimesions have to be [1036] worked with. They have to be taken into consideration.

Q. You mean the architect will tell you where these things will be? A. Well, he has got them drawn on his print. Now, if there is a conflict in what you find and what he has got drawn, then you will need further counseling on it. Other than that you comply with what is on the print.

Q. Now, in connection with your work preparatory to the installation of tile do you confer with any other crafts

or contractors? A. Oh, yes, we work, we work with all the crafts on the job. In our particular trade we are more or less starting the second phase of a job when we get on the job insomuch as we are starting to put the first finish work in. We are covering up the mechanical contractor. We are covering up and working with the electrical contractor. We are working with the tile setter. We are working with just everybody.

We start to tie a building together, so to speak, after the framework is up, and the mechanical is in, we start to put the finishing touches on it.

This necessitates close cooperation between everybody because actually our finish work is part of what they see, what they sell.

Q. Now, in connection with your position as superintendent [1037] have you received any complaints from tile contractors about the workmanship of our men? A. You mean has a contractor called my attention off the job or made a call to my office that this work wasn't up to par or something like that?

Q. Yes. A. No, never have I had a call come to the office where I was at with that to me, or even one of my employers. Now, there could have been a possibility on the job, there was a pipe out and we had to build a wall out or something, or there was a slight imperfection and the tile setter or somebody could have come and asked us to fit it, and we would do that on the job. Then I wouldn't probably know about the imperfection or something in the wall that could be corrected in, say, five or ten minutes, I wouldn't be, maybe, aware of it.

Q. Is that a typical job condition? A. Typical job condition?

Q. Well, what I mean is this a job circumstance that you run into on jobs? A. Well, yes, I think more than anything else.

Q. You have this with other trades besides the tile setters? A. You have this with anybody in the construction business. I mean, everybody has got tolerances that

they have to work within. I mean, I don't think any of the men under my [1038] supervision have ever told anybody that if there is a slight imperfection that they wouldn't be more than glad to take care of it immediately, not put anything off, lengthening it for a period of time.

Q. And do other crafts have to make corrections for your plasterers? A. Most assuredly. An electrician or anybody could put the wrong light ring on and he would have to come out and tear a hole. The plumber could have his plumbing wrong and have to come tear a whole wall off or part of a wall, to move it. This happens, has happened to everybody. People in the construction industry accept this.

Q. Now, could you give me a couple of examples of where plasterers must work to close tolerance other than, say, behind tile? A. Well, anywhere they are going to have a cabinet brought in on the job that is square.

Q. This prefabricated business were were talking about? A. Prefabricated, off the job, maybe San Antonio, Dallas or some other cabinet shop, and they are going to bring it down there, they may have three hundred fifty of them that are going to go in a hospital job, and they are going to set it in a corner. Then you have got close tolerances. Ornamental work you have got close tolerances.

Q. Ornamental plaster work, you mean? [1039] A. Ornamental plaster work.

Q. How about ceilings with modulated tiles? A. And corridors of buildings, the architect could call for full tile and then you have to work to that full tile.

Q. You mean the ceiling? A. Uh-huh, in the ceiling.

Q. And how do you work to that full time, in other words, how do you get your work so that it will fit full tile? A. By leveling it and rodding it, plumbing it.

Q. Squaring the rooms? A. Yes, squaring it. You have got to know his dimensions and work back from his dimensions.

Q. Now, take a typical office building job. Would you have gypsum plaster on top of tile wainscoting? A. Yes, you could have, or you could even have a gypsum ceiling over that. You could have various means, you know, they could be gyp four feet on up to eight feet six inches high and then plaster ceiling in the room.

Q. Well, let's take the situation, do you ever have anywhere you are putting Portland cement to be covered with a tile wainscoting and then gypsum wall? A. Yes, I don't have presently, but I have had numerous ones in the past.

Q. All right.

Well, give me your mode of operation in how your men [1040] would perform their various tasks in that job, in that type of installation. A. We like to go in, naturally, and scratch it, and then we will brown it.

Q. What part would you scratch? A. Well, we would scratch it with Portland cement up to the wainscot line. Then we would scratch from there. And if the ceiling was plastered we would scratch that. If it called for gypsum we would scratch it with gypsum. Then we would go back and brown the tile work first. We would square the room and brown and plumb for the tile work. And then he would immediately go on up, if it would allow us to, if the mechanical and everybody was in, brown the wainscot on up, brown the ceiling, and the most practical way for everybody involved, then, is to finish it and clean it up and get your scaffold out. Then when the tile setter comes in we are not forced to work behind him, and he is not forced to work behind us.

When you move scaffolding over tile work or something like that, there is a chance that it could be chipped or cracked, and then you have got a hassle on the job.

Q. You say when you would finish yours. What do you mean by finish yours? A. Well, we would put the finish coat on. I mean, we would brown it and finish it and put the finish coat on, and [1041] then the tile setter could

come right in and put his setting bed on there and go about his business.

Q. Well, you see, the record doesn't know what you mean by a finish coat. You are talking about a finish coat of gypsum? A. Finish coat of plaster, sand coat, white coat, sand plaster, whatever the specifications call for.

Q. That is above the wainscoting? A. That is above the wainscoting.

Hearing Office: I guess this area above the wainscoting, now, is not to receive tile, is that it?

The Witness: No, sir, I am sorry, we are saying, he said gypsum plaster. I am assuming, then, that there would be no tile on that. It would be a white coat finish or textured finish or sand finish, various means.

If we can do this above the wainscot, then, and finish it out, then the tile setter is free to come in there. As soon as he is free, done his work, then the plumber can come in and get on it and finish the job up.

Q. (By Mr. Capuano) Now, perhaps we better clarify it. By wainscoting what do you mean? A. Well, four, five, six foot wainscot, and then from that point up to the ceiling line.

Q. You would have gypsum plaster? A. Any thing below that is, the terminology is wainscot.

[1042] Q. I see. And below that would be the tile and above that would be the gypsum plaster finish? A. Would be plaster, yes.

Q. Now, could you tell me in connection with your job as superintendent what percentage of the jobs that you do in a year include doing the brown coat or back-up for the installation of tile in the thin-set method? Do you understand the question? A. Yes, I believe I do. I am just trying to run it over in my mind and see. Oh, the ones that I am involved in I would say about eighty-five per cent of them.

Q. O.K.

Now, could you also tell me from your experience what percentage of jobs done in this area on the back-up for tile, that is, the installation of the mortar coat, where the tile is done, or where the tile is installed after your mortar coat is dried, in the thin-set method, what percentage of these jobs do the plasterers do, install the mortar coat? Do you follow me? A. What percentage of the jobs in the area or—

Q. Yes, in this area, from your experience. A. Isn't that the question I just answered a minute ago?

Q. No, I asked you what percentage of your jobs include back-up for tile. Now I am asking you— A. Oh, I beg your pardon, I misunderstood the first one. [1043] The ones that include back-up for tile.

Q. Well, let's go back to that. A. The first one, I would like to ge the first one.

Q. All right. What percentage of the jobs—say you do a hundred jobs in a year. A. Yes.

Q. What percentage of those hundred jobs would include some back-up for tile? A. Oh, some back-up for tile. Well, not all of them do.

Q. Well, give me a percentage. A. It has to be about, maybe, ninety per cent, ninety-five per cent.

Q. All right.

Now, taking your experience in this area, working for Doerner and the other people, what percentage of all the jobs that you know of where a mortar coat is installed, tile is going to be put on with a thin-set method, what proportion of the work, the installation of that mortar coat, is done by plasterers in this area? A. About eighty-five per cent.

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[1047] Cross Examination

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[1051] Q. Are there more, as far as you know—now, you have said you are not an expert on tile setting. As far as you know, would there be some more demands on a

preparation for a wall or a ceiling to receive tile than for this type of a finish? A. Yeah, there's certain demands on this wall. This wall has to be pretty straight. It's going to get tile on it, accoustical tile up against it. It's going to get, maybe when they did this wall there could have been a cabinet was [1052] going to be in there, there has to be a certain amount of thought go into this wall. They can't just slap it up there.

Q. But my question is is it the same amount, as far as you know, in the installation of tile, do you think that this wall, for you to put a finished plaster coat on this wall, do you think that would take no more than it would for a wall that was going to receive tile? A. No, because of the fact we have so many close dimensions in the bathroom and so many things to work with, it is going to necessitate some more time.

Q. For the tile installation, you are saying? A. Yes, sir.

Q. All right. A. Because of the plumbing fixtures and things going in there.

Q. What about the courses of the tile, to have the joints straight and all that sort of thing? A. The course of the tile would be up to the tile setter.

Q. Well, I know that it is, but I am talking about the foundation getting ready for the tile setter. A. We just have to plumb it and square it, rod it true.

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[1056] Q. Isn't generally the plasterers gone off of the job when the tile setter comes in? A. Not all the time, no, ma'am.

Q. Don't you, the different crafts, generally work with each other, that one finishes up before the other one comes in, on a given area, now? A. In an area?

Q. Yes. A. Yes, but I have always made it a point to go check with the tile contractors and see if everything was progressing satisfactorily.

Q. Now, when you put on your brown coat and you know there is going to be a thin-set, do you go get the

specs. of the tile contractor and know what size his tile is going [1057] to be and the thickness of it? A. Yes, ma'am, we check generally with the job superintendent and see if he has got that information. If he doesn't then he will contact the architect and relay the information. In the event the tile setter hasn't a superintendent, which most of these contractors in town have superintendents, like Mr. Doerner, then we confer on the job, and we know what the thickness of the job, of the tile is going to be. It's mandatory that you know.

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[1059] Q. Oh, I see. All right.

If you were going to square up a room what opening do you start from? A. What opening?

Q. Uh-huh. A. Oh, I think there is more to be taken into consideration than just an opening. I think you have first got to find out something about what the plumber is going to require.

Q. Well, now, this particular question I have in mind is just without any plumbing involved. Say in a corridor. A. If I were going to brown for the tile setter in the corridor?

Q. Yes. A. I would go to the prints and I would find out what margin was required by the architect on the door bucks.

Q. Yes. A. Then I would work from there.

Q. Do you know in advance how much his space, how much space he is going to have? A. Yes, ma'am, he generally has it on his door schedule, on the prints.

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[1061] ROBERT EUGENE UNDERHILL

was called as a witness by and on behalf of the Plasterers and, having been first duly sworn, was examined and testified as follows:

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Q. (By Mr. Capuano) Mr. Underhill, are you a plastering contractor? A. Yes, sir.

Q. And what is the name of your company? A. Gulf Plastering.

[1062] Q. And how long have you been in business? A. Since 1957.

Q. Are you a plasterer by trade, too? A. No, sir.

Q. Now, in connection with your business has your company prepared walls with Portland cement to receive tile? A. Yes, sir.

Q. And have you prepared them for installation in the conventional method and the thin-set? A. Yes, sir. However, most of it is for the thin-set.

Q. Thin-set. O.K.

Now, can you give me from your recollection the names of some of the jobs, give me the name of one, as a starter. A. Well, two Spring Branch junior high schools.

Q. And where were those jobs? A. In Spring Branch. One on Westwood. One was the Westwood School. One was the Meadowood School.

Q. Is that in the Houston area? A. Yes, sir.

Q. Could you tell me approximately when that was? A. We finished in January of this year, I believe.

Q. All right.

And could you tell me what type of installation your men did on those jobs? A. We browned different small areas for the tile setters. [1063] There wasn't much tile on the job. We browned recesses for drinking fountains over masonry in most cases and some round columns in the kitchen and some kitchen walls and most of the bathrooms were glazed tile.

Q. All right.

Now, you say you browned over masonry and then the tile setter put his tile on that, is that the idea? A. Yes, sir, he used his setting bed and stuck his tile to it.

Q. Do you know what type of material he used as his setting bed? A. It was a thin-set material. I don't know what name brand it was.

Q. All right.

Could you tell me who the tile contractor was, do you recall? A. No, sir, I don't.

Q. All right.

Can you tell me another job you did? How about the Northeast Baptist Hospital, do you recall that? A. Yes, sir. This was some time ago.

Q. About 1962? A. Yes, sir.

Q. And is that here in Houston? A. Yes, sir.

[1064] Q. And could you tell me what type of work you had there? A. We had all the walls and all of the ceilings and partitions throughout the complete building.

Q. How about for back-up for tile? A. Yes, sir, all of that also, in every bathroom which there was approximately two hundred, and down every hallway, which there was four major hallways over two hundred feet long, and several minor hallways a hundred to maybe sixty feet long.

Q. Was that Portland cement behind the tile? A. In most cases, all wet areas. The hallway, however, was in most cases gypsum plaster except where they were adjacent to a bathroom, the bathrooms backed up to the hallways.

Q. I see. Then you put Portland? A. We put Portland cement in all the bathrooms and all of the kitchen area was also tile completely to the ceiling.

Q. All right. And how many coats did you put behind the tile? A. These were two inch solid walls in most cases which require, they are similar to this type of wall, six coats of plaster, counting both sides. Actually there was a scratch coat and a brown coat on the hallway side, which received tile in the thin-set method over this.

Q. All right.

[1065] And your plasterers did the work you just described? A. Yes, sir.

Q. How about do you recall the tile contractor on that job? A. No, sir, I don't believe he was a member of any

of the associations, and I don't believe he was continuously in the tile business.

Q. O.K.

How about the Northwest Baptist Hospital, do you recall that one? A. Yes, sir, it was the same architect, same general contractor and owner, and the same method in all phases.

Q. And was that more recent than the other one? A. Yes, sir.

Q. When was that one? A. This is the Northwest?

Q. Yes, sir. A. This was finished approximately fifteen or sixteen months ago.

Q. Do you recall the tile contractor there? A. No, sir.

Q. How about Southwest Baptist Hospital, do you recall that job? A. Yes, sir, that was in 1963.

Q. Was the method of installation the same or different from the above, from the above jobs? [1066] A. It was the same.

Q. The same.

Did you have tile basically in the same areas, bathrooms, and so forth? A. Basically. There was one exception on this Northwest Hospital, I believe it was, that the exception being that the general contractor and owner, together, wanted vinyl down the hallways, but they did tile every bathroom.

How about the Golden Age Nursing Home? A. This was by the same people that built the hospitals and it was essentially the same except there was no tile in the bathrooms.

Q. Was this five jobs? A. Yes, it was five of them, complete.

Q. Where was the tile on those jobs? A. In the bathrooms and kitchen areas.

Q. Oh, there was tile in the bathrooms there? A. Yes.

Q. Same type of installation you just described? A. Same type.

Q. Did you have any, on any of these jobs, tile or your brown coat over masonry instead of lath and scratch coat?

A. If a masonry wall happened to be one of the walls in a bathroom or kitchen, it was then plastered one coat over.

[1067] O.K.

How about the Shadow Oaks School? A. This was another job similar to the same, it was all two and a half inch solid partitions with cement, scratched and browned in all the bathrooms.

Q. All right.

Tile put on the thin-set method? A. Yes, sir.

Q. Do you recall the tile contractor? A. No, sir, I don't. That one was a long time ago.

Q. That was about 1959, was it? A. Yes, sir.

Q. How about the Willow— A. Willowmeadows Baptist Church?

Q. Right. A. This job is just being finished at this time. I have men on it today. There is not a lot of tile on it. There is some of this little mosaic tile on the exterior of the building which we lathed it, scratched it and browned it for this tile and furnished a scaffold for the tile setters.

Q. Do you recall who he is? A. No, sir, I have no contact with him personally. We just left our scaffolds there at his convenience because we had some cleaning to do and he completed the job very fast, I think about two days is all he was there.

[1068] Q. Did he ask you to leave the scaffold there? A. No, the general contractor did as a matter of convenience. We were trading out a scaffold. It was approximately some sixty feet in the air.

Q. O.K. We have covered the Spring Branch Schools, haven't we? A. Yes, sir.

Q. How about the Methodist Hospital in Houston? A. That would be the ninth story addition to it.

Q. Yes, that's right. A. Yes, there was two inch solid partitions and a little plaster over masonry on it.

Q. Where would that be, in what areas? A. In the

hallways they plastered, they put tile over the hallways in the thin-set method.

Q. O.K. And that was about 1961, was it? A. Yes, '60 and '61, yes.

Q. How about the Beall Department Store? A. That is in Beaumont.

Q. Is that in Local 79? A. That is in Beaumont.

Q. All right. Never mind.

How about United Gas Building? A. In Baytown?

Q. Yes. [1069] A. This was mostly mosaics stuck onto a brown coat of cement on the outside.

Q. All right. A. Just strips over and under the windows.

Q. And you browned for that? A. Yes, sir.

Q. With plasterers? A. Yes, sir.

Q. And how was the mosaic put on? A. Thin-set method.

Q. Was that about 1961? A. Yes, sir.

Q. How about the Robert E. Lee High School in Baytown, do you recall that one? A. Yes, sir, there was very little tile in the lobby of that, and it was over plaster walls, which were scratched and browned by my men.

Q. Was that gypsum or Portland? A. All where it called for the tile it was Portland.

Q. All right.

How about the First National Bank in Livingston, Texas? A. This was just the bathrooms and some little bit of work in the lobby, and it was scratched and browned by my plasterers.

Q. Bellfort State Bank in Houston. A. The same situation.

[1070] Q. Was that in 1965? A. Yes.

Q. Do you recall the tile contractor on that? A. Not offhand, no.

Q. How about the Second National Bank in, what is this, Atlanta, Texas? A. That is out of this jurisdiction.

Q. Oh.

How about the Alvin State Bank, do you recall that one back in '58? A. Yes, sir. There was tile in all the bathrooms which were set, I don't really remember how it was set there, whether it was thin-set or conventional.

Q. You browned it out, though, is that right? I mean. you put the scratch and brown coat on? A. We scratched the walls and done what plastering was required by the specifications. I don't actually remember how that one was.

Q. O.K. How about the First State Bank at Alvin? A. This was a remodel job. We did all the lathing on it preparatory to the application of marble, which was stuck over the lath and plaster, and I really don't think there was any thin-set tile on that except in the entryway, which was over some that was already existing.

Q. I see. O.K.

[1071] How about Hermann Hospital addition, do you recall that one? A. Yes, sir.

Q. Is that a recent job? A. Yes, sir.

Q. What year would that be, approximately? A. Last year.

Q. All right.

And that is here in Houston? A. Yes, sir.

Q. And was there any back-up for tile done there by your people? A. That job was a sheetrock job.

Q. I see. A. With a thin coat of plaster over it, and there was quite a bit of fireproofing around the stairwalls which the tile, if any, was used on the rest room sides and I can't really say how the tile was applied or if there was any there.

Q. O.K. A. Other than some mosaic on the outside, which was over walls that we fabricated and put above the doors.

Q. O.K.

How about United Surgical and Dental Trades Center? A. That plastering there was mostly over masonry in the bathroom areas, and we did do this browning.

[1072] All right.

Tile set in what manner? A. In the thin-set manner.

Q. Do you recall any other jobs offhand other than the ones we have named? A. No, sir.

Q. Did you have a job, a hospital job in Yoakum, Texas? A. Yes, sir.

Q. When was that? A. This was finished about this time last year.

Q. All right. And did you have any back-up for tile there? A. Yes, sir, we built all of the walls and ceilings on that job and all of the bathrooms were tiled over cement and brown coat and scratched coat that we put in.

Q. All right. Was that thin-set, too? A. Yes, sir.

Hearing Officer: Is this Yoakum within 79's jurisdiction?

Mr. Capuano: Yes, sir.

The Witness: It's on the border.

Q. (By Mr. Capuano) Now, have you prepared walls with gypsum plaster which were to receive tile? A. Yes, sir.

Q. Now, would you tell me just generally how your people would prepare, your plasterers would prepare a wall with Portland cement to receive tile? A. Take a metal lath wall. [1073] A. Well, to start with, the lathers would build the wall out of channel iron and metal lath and plumb it, and the plasterers would scratch it and brown it plumb.

Q. How would they put the brown coat on, the plasterers? A. With a hawk and trowel and put it on plumb.

Q. All right.

Tell me how your people, your plasterers, would prepare the same wall if it was going to be made out of gypsum plaster. A. In the same manner, exactly.

Q. Would there be any difference in how they—let me ask you this, would they do anything with the wall, the plasterers, with their brown coat? How would they actually put their brown coat on? A. To receive tile or just—

Q. No, receive tile, Portland cement. A. Well, if it was a long hallway where everything would reflect imperfections or faults, we would plumb, we would find the center of the hallway, snap a line down the center, start at end end, we would make a plumb mark up to the height, door header height, and pull a line from one end of the hallway to the other, and use molding plaster to make a dot every six foot or rod length, which would coincide and be directly square and plumb with the center line in the floor.

[1074] Q. I see. A. And then we would build a screed from one end to the other to come flush with these dots, and then fill the plaster in from there down and up.

Q. Rod off from there, then? A. Yes, sir.

Q. Now, when your company has been preparing the walls to receive plaster on these jobs, I am sorry, to receive tile on these jobs you just described to me, has any tile setter union representative or any tile setters come to you and claimed the work that the plasterers were doing? A. No, sir.

Q. Now, have you ever seen tile installed in the conventional method in a thick mortar setting bed? A. Yes, sir, I have helped.

Q. You have helped do it? A. Yes, sir, the first job I ever had was as a tile setter's helper.

Q. All right.

And you have seen plasterers put up a brown mortar coat also, haven't you? A. Yes, sir.

Q. Are the materials in those two coats basically the same? A. Basically.

Q. All right.

[1075] Now, could you tell me which craft, tile setter or plasterer, can do a more skillful and more efficient job in putting that coat of mortar on the wall? A. Well, you are asking for two, an answer to two questions at once. First you say more skillful. I don't think the plasterers are any more skillful as far as getting the wall plumber because you can only get it perfect or the quality can only be so good, I don't care who puts it up.

Q. All right. A. But then you ask me who is the most proficient? If you mean who is the fastest and who can perform this the fastest, the plasterers can perform it the fastest, but I don't believe he is any better in his finished work. I don't believe it's any better than a tile setter. But it is as good and it is faster.

Q. All right.

Now, could you tell me whether you as a plastering contractor have received any complaints from tile contractors about the quality of the work that your plasterers perform under the tile? A. Well, this covers a long period of time. Now, there was a time, I think, in 1959 we had problems on one job, and I haven't run into any since then.

Q. Now, could you tell me some other types of installations where your plasterers use Portland cement besides behind tile? [1076] A. We use so much Portland cement my plasterers are getting to think there isn't any gyp any more. Last year we didn't put four hundred bags of gyp all year long. We put several carloads, in fact we averaged practically a carload of cement a month, on canopies and then the exterior of buildings, and overhangs, just many places that it's used on the exterior of buildings and some interiors, but mostly, generally speaking, Portland cement is used in the wet areas on the interiors of buildings and mostly always on exteriors.

Q. O.K.

Now, you are a lathing contractor also? A. Yes, sir.

Q. Do you also, then, build walls from the outside, I mean, build the complete wall? A. Yes, sir, we did on this Willowmeadows Church, we built the complete wall, outside and inside, of the exterior of the building.

Q. Including the studding that goes in the building of the wall? A. Yes, sir.

Q. Could you tell me, in your opinion, which craft, the tile setters or the plasterers, has the area practice in this Houston metropolitan area for the preparation of walls to receive tile? And I am talking about the Portland cement

mortar coat over which tile is to be installed in the thin-set [1077] method. A. Well, actually I can only speak for the jobs that we do.

Q. Yes, in your experience. A. Which last year we did seventy-five, seventy-eight jobs, if you count little bitty contracts as jobs. And I don't know of any instance where anyone else put up the brown coat for the tile. This may have happened, but I don't know of it.

Q. O.K. A. On the jobs that I do know about.

Q. Well, I believe you said we. Which craft was it that did all these jobs? A. The plasterers.

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ERNEST ALFONSE RICHTER

was called as a witness by and on behalf of the Plasterers and, having been first duly sworn, was examined and testified [1078] as follows:

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Q. (By Mr. Capuano) Mr. Richter, could you tell me by whom you are employed? A. Tobin & Rooney Plastering Contractors.

Q. And what is your position with Tobin & Rooney? A. Field superintendent.

Q. You are a plasterer, are you? A. Yes, sir.

Q. How long have you been a plasterer? A. Forty-two years.

Q. How long have you been in a supervisory position for Tobin & Rooney? A. Approximately ten.

Q. Now, in connection with your work as a field supervisor, have you had jobs under your supervision where walls have been prepared with Portland cement to receive tile? A. I have.

Q. And have you prepared walls where tile was installed in both the conventional and thin-set methods? A. I have.

[1079] Q. Now, I am going to ask you about various jobs and I would appreciate it if you could tell me if you

recognize these jobs and can tell me anything about them. How about the Boy Scouts Building here in Houston? A. Yes, sir, the toilet rooms in that were browned out by the plasterers and fixed up for the thin-set method. They were plumbed, squared.

Q. Rodded, too? A. Rodded, too.

Q. Was that over block, do you know, or metal lath? A. Some of it was over metal lath and some of it was on block. It's been about five years, I think.

Q. O.K.

Now, how about St. Joseph's Hospital, do you recall that job? A. Yes, sir.

Q. Is that here in Houston? A. Yes sir.

Q. When was that? A. That was just this past year.

Q. And was there a back-up for tile done there? A. Yes, sir, in all bathrooms.

Q. And where were the bathrooms, in each room? A. In the rooms.

Q. You mean in each hospital bedroom, in effect? [1080] A. That's right. In this particular wing I believe that you are speaking of there was the north wing, and it had three mechanical floors underneath it. Some parts had a kitchen in it, but we did both wings of the hospital, and they were all done the same way.

Q. O.K. And was the tile set in the thin-set method? A. Yes, sir.

Q. And who put on the brown or plumb coat of mortar? A. Plasterers.

Q. Did you have scratching there underneath it, too? A. Some places, where it was metal lath.

Q. Do you recall the tile contractor on that job? A. No, sir, I sure don't.

Q. How about the Boy Scout Building? A. No, I don't.

Q. Do you recall whether your plumb coat of mortar was dry when the tile setters started to apply their thin-set material? A. When you speak of dry how many days elapsed in between the applications, is that what you are speaking about?

Q. Yes. A. I would say approximately a week.

Q. O.K. A. On the St. Joseph's Hospital. Sometimes it's longer.

Q. How about the Nurses Dormitory at the Houston Medical [1081] Center, is that— A. Yes.

Q. When was that job, approximately? A. Oh, that job was approximately '62, I believe.

Q. All right.

And what type of tile wall preparation did you do there? A. What type? Same type. We scratched and browned wherever there was lath.

Q. And where did they have or where was the tile going to be installed in that job? A. In the bathrooms.

Q. In the bathrooms. O.K.

How about the Windsor School in Houston, do you recall that one? A. Yes, sir.

Q. About '62, was it? A. Yes, sir.

Q. What type of installation was that? A. That was thin-set.

Q. Did your plasterers perform the same functions we have been talking about? A. Yes, sir.

Q. And what did you have there, bathrooms? A. Bathrooms, yes, sir.

Q. Shower rooms? [1082] A. Some places in corridors, locker rooms.

Q. Corridors, too, you say? A. Some places around the drinking fountains sometimes they have a tile panel.

Q. I see. And was this in Portland cement? A. Yes, sir.

Q. Do you recall the tile contractor? A. That was in '61. No, I don't. That is pretty far back.

Q. How about the Cypress-Fairbanks School? A. The Cypress-Fairbanks School, yes, sir.

Q. That is in the Houston area, too? A. That is in the Houston area. It's up the road about twenty miles.

Q. About in 1962, was it? A. Yes, sir.

Q. Was that a similar installation as to what we have just been talking about? A. Yes, sir, the tile contractor on that was Narciso.

Q. All right.

And plasterers did your browning and plastering? A. Yes, sir. * * *

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[1083] Q. All right. How about the Cookbook Bakery? A. Yes, sir.

Q. Is that here in Houston? A. Yes, sir.

Q. Was that back in about '58? A. Yes, sir.

Q. And was the installation similar or different? A. Similar, same thing.

Q. How about the Hermann— A. Professional Building?

Q. Professional Building, yes. Is that here in Houston, too? A. Yes, sir.

[1084] Q. About 1958? A. Yes, sir.

Q. Installation the same? A. The same thing.

Q. How about the Houston Hospital at Elgin and Ennis in about 1961, do you recall that one? A. Yes, sir.

Q. And what was the— A. We browned for the tile in the kitchen and in the bathrooms and in the wet areas.

Q. Thin-set method? A. Thinset.

Q. How about Tidelands Motel on Main Street? A. Yes, sir.

Q. Is that back about '57 and 58? A. Yes, sir, that was originally. They added some since then, but we didn't have it.

Q. All right. Was that thin-set, too? A. Same thing.

Q. You did the browning? A. Yes, sir.

Q. How about Little York School? A. Yes, sir, that is out here on Little York Road. Same thing.

Q. All right.

[1085] Let me read off the various names of some jobs I have here, and if you don't recognize one, interrupt me, but if you recognize them all, wait until I finish with the list and we can talk about it. A. O.K.

Q. How about the Reed Road School? A. Yes.

Q. Dominican College? A. Yes.

Q. McBar Company? A. Yes, sir.

Q. Hotel America? A. Yes, sir.

Q. 2016 Main Building? A. Yes, sir.

Q. What was that, the name of the building or the address of the building? A. 2016 Building. It's apartments.

Q. Oh.

T. J. Bettes? A. T. J. Bettes.

Q. What is that? A. They remodeled an office building they bought on Franklin and Main, and we went in there and remodeled it and we had some bathrooms in there that was done in the thin-set [1086] method.

Q. Fannin State Bank? A. Yes, sir, that was in a new building.

Q. St. Elizabeth's Hospital, Number 2 Wing? A. Yes, sir.

Q. Sharpstown Hospital Memorial or, wait a minute, I will take that one off.

Kress. A. At Main and Capitol, yes, sir.

Q. What is that, is that an office building? A. That is an office building up over the Kress Store. It was called the Kress building.

Q. How about the Medical Arts remodeling job? A. Yes, sir.

Q. Americana Building? A. Yes, sir.

Q. Hotel America? A. Yes, sir.

Q. Siteman Building? A. Yes, sir.

Q. American General? A. Yes, sir.

Q. What is the American General? A. American General is the insurance building out here on Allen Parkway and the tile work that was in that, we [1087] didn't have too much, it was just wing walls in the toilet rooms that divided the individual commodes, and they had tile on those wing walls.

Q. Is that about 1965? A. Yes, sir.

Q. How about Jones Hall? A. Yes, sir, that was last year.

Q. Now, were all these jobs in the Houston area that we just went over? A. Yes, sir.

Q. And were all of them between about 1960 and 1966? A. Well, some of them were '58 and '57.

Q. I mean just the last ones we covered. A. Just the last ones, yes, sir.

Q. Now, was the installation on those any different from the ones we had just covered previously? A. No, sir.

Q. Same type installation? A. Same type installation.

Q. You scratched and browned? A. Yes, sir.

Q. Tile is the thin-set, is that right? A. Uh-huh. We are also doing the one across the street here the same way, the Civic Center.

Q. What is that? [1088] A. We are also doing the Civic Center the same way.

Q. The Civic Center across the street? A. Yes, sir.

Q. Is that a big job? A. It covers three blocks.

Q. Pardon me? A. It covers three blocks.

Q. And what are you doing there? A. Well, we are plastering.

Q. In connection with tile. A. Oh, we are browning for tile, for thin-set.

Q. And any scratch coat under your brown there? A. No, sir, might be one pipe chase in the toilet room that has lath on it, but the rest of it would be on concrete block.

Q. All right. And you are putting on one plumb coat? A. One plumb coat.

Q. And then the tile setters are going to install their tile the thin-set method? A. That's right.

Q. By the way, all those jobs we covered, I am not sure we mentioned it, those are the jobs where you did the back-up for the tile, right? A. Yes, sir.

Q. Now, in putting up your brown coat, say, on top of the [1089] scratch coat, would you tell me what tasks your plasterers would do? A. Well, it depends particularly on the specific area you are working in. If it's a bathroom you have to work according to your plumbing outlet, your door reveals and things such as that. If you are working inside of a corridor you have to find the center line and work off of it. But in your bathrooms you have to get,

keep a certain dimension on the hub on the plumbing. Let me inject this thought, we do quite a bit of real large work, and we get into the multiple bathroom facilities to where we have a gang of plumbing fixtures that stick out of one long wall. And you work with the plumbing and then you work toward the door. There are several of the things you have to work to. The general contractor generally lays out the finish wall line and you work off of it.

Q. All right.

Then how will your plasterers go about putting up your brown coat? A. How would they go about putting up—

Q. Yes. A. They would screed the wall.

Q. Put screeds on the wall? A. Put screeds on the wall. horizontal and vertical screeds.

Q. All right.

[1090] How about squaring? A. Well, if they have to square any they could go with three, four, five method or either six, eight and ten.

Q. O.K. A. Or either we use a big, large wooden square lots of times in a small bathroom like hotel bathrooms or hospital bathrooms, we will make a couple of wooden squares, and after we get one wall that has the fixed location for the finished type of plaster, why, we square off of that and work around a small room.

Q. O.K.

Have the tile setters ever made a claim on you for the installation of your brown coat? A. No, they never asked for the brown coat, no, sir.

Q. Now, when you go on a job do you have any dimensions that you must meet? A. In what respect?

Q. In various rooms. A. In various rooms there are dimensions on the plans.

Q. There are dimensions on the plans? A. Yes, sir, and if there is any cabinet work, why, you have to stay within those dimensions.

Q. Can you vary those dimensions on your own? A. No, sir, we never do.

Q. Why is that? [1091] A. We get authorizations to vary them if it goes against the plans and specifications. Otherwise you will have to take it down if it's not right. We verify it with the superintendent and if he can't verify it, why, he goes to the architect.

Q. Why is it so important that you maintain the specifications on the plans? A. Well a lot of these prefab fixtures, Formica tops and things like that, that can't be cut and trimmed after they get on the job, and they are made up to a certain specific measurement, and when they slip into this particular spot they would have to go in there, whether it be tile or whether it be plaster, you have to use the same—

Q. Dimensions? A. Dimensions, everything such as that.

Q. Now, do you confer with any other craft superintendents or foremen on construction jobs in connection with your work? A. Yes, sir, we do.

Q. Pardon me? A. Yes, sir.

Q. Who do you confer with, what crafts? I don't mean names. A. You mean in reference to tile work or reference to—

Q. Yes. A. —anything? Well, whereover we have any discrepancies I have a foreman on the job that takes care of it, that works [1092] with the superintendent. If it's something he can't take care of, well, I will try and go up over him.

Q. Do you talk to any crafts besides the, in other words, in connection with your work do you have to talk to any other craft foremen on the job? A. Oh, yes, sir. On these hubs on these bathrooms. Now, the plumber needs a specific measurement. You have to get the thickness of your tile. You can either get it from a tile man or either you can get it from the architect. He generally has a sample of what he has got. And when you get with the plumber and find out how much protrusion he has to have on the hub of his pipe and then you start working from there, and that is generally the first wall we start.

Q. Are the tubs already installed when you do the area around the tub? A. The tub?

Q. Yes. A. Yes, sir.

Q. They are? A. Yes, sir.

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[1094] Q. All right.

Now, have you seen tile setters install that three-eighths of an inch coat you just mentioned? A. Sure have, yes, sir.

Q. Have you seen plasterers install your brown or float coat? A. Yes, sir.

Q. Could you tell me whether one craft performs the installation of that mortar coat, be it a brown coat or a three-eighths setting bed, more efficienty than the other craft? A. More efficiently?

Q. Yes. A. I would say the plasterer would.

Q. Pardon me? A. The plasterer would.

Q. And why would you say that? [1095] A. Well, because he can do it faster. He works with a hawk and trowel eight hours a day. You might say, well, the tile setter works with it two hours. It would be efficiently, it would cost less for the operation.

Q. For whom to do it? A. Huh?

Q. For which craft to do it? A. Well, I would say for the job—job-wise cost, job cost-wise?

Q. Yes. A. I would say the plasterer could do the work a whole lot quicker.

Q. All right.

What would be your opinion as to the quality of the installation, in other words, the plumbness and straightness, and so forth? A. Well, I would say that our men could do it just as good as theirs. They might take a little bit longer.

Q. Who may take longer? A. Well, the tile setter.

Q. I see.

Now, have you had situations where you will have bathrooms with a little wainscot and gypsum plaster above it? A. Yes, sir.

Q. And we have had some testimony on this. Would your method of installation be similar to that? Have you been [1096] sitting here during this testimony? A. Yes, sir.

Q. You would put in the brown coat and then your finish coat before the tile is installed? A. Yes, sir.

Q. And that is typical? A. Typical, unless it specified that the finish coat should finish flush with the tile.

Q. All right. A. And then the tile has to go in and we get the finish coat afterward.

Q. Assuming you have your finish coat already on the wall above the wainscoting, are the dimensions of the room set at that point? A. Yes, sir, that would be set in setting your dimensions. In other words, the brown coat that you put on for the tile man would be continued up the wall and then as you come down with your finish coat you would come down approximately an inch or an inch and a half below the tile line so that whenever the tile man finished his operation it would be complete. There would be no patching involved.

Q. Now, if another craft did the brown coat for the tile below the wainscoting—let me put it this way, if one craft did the brown coat for the wainscoting and a different craft did the brown coat for the gypsum plaster above the [1097] wainscoting would they have to, and assuming the tile is going to be flush with your plaster, would they both have to use the same dimensions for plumbness and squareness, and so forth? A. Well, let me say this, that in what respect are you asking me this question, now, that if someone else was to put on the brown coat?

Q. Yes, in other words, another craft other than plasterers put on the brown coat up to the wainscoting, top of the wainscoting, the tile. A. Yes, sir.

Q. Then your plasterers did the gypsum brown coat above that, and they put the white coat above that, but another craft was going to put the brown coat below it, and the tile is to finish flush with the plaster, can you have, would one craft have to follow the dimensions already set

by the other craft or could they each go their own way? A. Well, I have never run into that particular situation. I know what you are saying there, that if someone, say that, for instance, that the tile man goes in there and browns up the wall, we will have to follow his wall. Otherwise you will have a variance of thickness on his tile wainscot around the top of the tile.

Q. All right.

And if you went in and browned the wall before he put his [1098] brown coat in the bottom, he would have to follow your brown coat, correct? A. That's right.

Q. Now, in connection with the jobs you have under your supervision and taking last year as an example, 1966, could you tell me what percentage of the total number of jobs you had where there was included for your plasterer's back-up on the installation of a plumb coat of mortar for the installation of tile? Do you understand the question? A. Yes, sir. I would say about ninety-five per cent.

Q. All right. A. We are on one job now that they are applying the tile directly to concrete block on the Houston Natural Gas Building, twenty-eight stories.

Q. Directly to block? A. Directly to block.

Q. Now, in your experience could you tell me in this area which craft has the area practice for the installation of this plumb coat of mortar behind tile to be installed in the thin-set method? A. Well, I don't see any other way out. We do ninety-five per cent of it.

Q. The plasterers do? A. The plasterers do. In the area.

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[1099] HARRY DUCKETT

was called as a witness by and on behalf of the Plasterers and, having been first duly sworn, was examined and testified as follows:

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[1100] Direct Examination

Q. (By Mr. Capuano) Mr. Ducket, could you tell me what company you are connected with? A. I am at the present time connected with the Plastering Contractors Corporation.

Q. And what is your position with that company? A. President.

Q. And how long have you been connected with this particular company? A. Since we purchased Charles F. Schilling Company two and a half years ago.

Q. Were you with another employer or company prior to that time, two and a half years ago? A. Yes, I was with Charles F. Schilling Company.

Q. Oh, I see. A. And vice president of that company and head of the Plastering Division for seven years.

Q. For seven years. A. Uh-huh.

Q. All right.

And what kind of company was Charles Schilling Company? A. He was a multiple organization of acoustical tile, flooring and plastering and dry wall.

[1101] Q. All right.

And prior to that what company were you connected with? A. I was with the American Construction Company, general contractors, for approximately thirty years.

Q. They are a general contractor? A. Yes, sir.

Q. All right. A. And let me say this, headed their plastering Division which they did their own plastering.

Q. O.K.

And has all this been in the Houston area? A. Right.

Q. Now, during your experience with Plastering Contractors and Schilling, had your company had contracts where you prepared walls to receive tile? A. Yes.

Q. Now, I am going to go over a few jobs with you. Let me ask you this first, can you give me the name of any jobs that you can recall where you prepared walls to receive tile? A. Quite a few of them.

Q. All right. You give me the ones you can remember.

A. Twin Towers jobs, one of which is completed and the other one isn't completed at present.

Q. What are Twin Towers, are they apartment houses? A. They are apartment houses.

[1102] Q. And what type of preparation for tile did you do there? A. We scratched and browned the entire surface.

Q. What were there, bathrooms in the apartments? A. In the bathrooms, right.

Q. And this was over metal lath, I gather? A. Right.

Q. And Portland cement? A. Portland cement.

Q. Now, were the whole bathrooms Portland cement? A. Yes.

Q. O.K.

And how was the tile set? A. It was all thin coat, thin-set.

Q. Thin-set method? A. Right.

Q. Do you know what type of commercial thin-set was being used? A. Not positive, but L.&M., I think.

Q. O.K. That was Twin Towers. Can you think of another one? A. We have done three high schools in Spring Branch.

Q. O.K. A. All of which we scratched and browned behind the ceramic tile.

Q. And when were they done or are they still in progress? [1103] A. One is in progress now, and the other two have been done within the last three years.

Q. All right. Who did the scratching and browning? A. The plasterers did the scratching and browning throughout.

Q. Is that going to be thin-set or were they thin-set, too? A. Yes.

Q. All right.

Can you think of any other jobs? A. We did —

Q. 500 Jefferson Building? A. 500 Jefferson Building. Which was all scratched and browned for ceramic tile.

Q. What is that, an office building? A. That is an office building.

Q. How about the zoo birdhouse? A. We did the birdhouse at the zoo.

Q. All right. A. The toilet rooms. There are two toilet rooms in the thing, which were scratched and browned, but the whole job is Portland cement.

Q. What do you mean the whole job is Portland cement? A. Imitation rocks, and the entire job on it was done with Portland cement.

Q. You mean the outside, exterior of the building? A. The inside of the building.

Q. Inside, too? [1104] A. Including the partitions, which were two-inch plaster partitions.

Q. What kind of plaster do you mean, gypsum or Portland? A. Portland.

Q. Do you know the let's go back, do you know the tile contractor on the [illegible] Towers? A. I do not, I don't remember.

Q. How about the Spring Branch schools? A. I don't remember.

Q. How about 500 Jefferson? A. I don't remember which one was there.

Q. And the zoo birdhouse? A. No, I do not.

Q. McGinty office? A. McGinty Office Building.

Q. That is an office building here? A. Right. That is a small office building.

Q. When was that, last year? A. That was last year.

Q. Same installation, scratching and browning? A. Part of it was scratched and browned on metal lath and part of it was thin-set on dry wall.

Q. O.K. And all these have been in Houston, haven't they? A. Right.

Q. How about the Brazosport School? [1105] A. That is the only that is not in Houston. That is at Velasco, Texas.

Q. The McGinty office building, what tile contractor? A. I don't recall.

Q. All right.

This Brazosport School, was that—when was that, approximately? A. Oh, five, four years ago.

Q. All right.

And was that the same installation, thin-set? A. Right.

Q. Where did you have tile there? A. In the bathrooms, toilet rooms.

Q. Who was the tile contractor, do you recall? A. I don't recall.

Q. How about the Cameron Lob? A. Cameron Laboratories.

Q. Oh, Cameron Laboratories, I am sorry. A. The partitions in there were all plastered either on metal lath or masonry, and there was quite a bit of ceramic tile in behind laboratory fixtures and in the toilet rooms, all of which we scratched and browned behind.

Q. With Portland cement? A. With Portland cement.

Q. Tile contractor, do you know? [1106] A. I do not. I will say this, I have done a lot of work with Mr. Martini and Mr. Zambon and Narciso, and I have no, I just don't recall which ones did which job.

Q. I see. O.K.

How about the Petrotex Office Building? A. It was an office building out on the east end of town, east side of town, which we scratched and browned behind the ceramic tile there.

Q. Was that 1965? A. That was '65. That was the third job we had done out there for them, '65 and '63 and '61, I believe.

Q. Pardon me, you had three jobs out there? A. There were three different jobs out there.

Q. I see.

Were any of them conventional method or were they all— A. I think the first one was the conventional method.

Q. You mean over your brown coat— A. We put the brown coat on and then the conventional bed coat was put on, and the tile installed immediately.

Q. Then on the other two jobs what was done after your brown coat? A. A thin coat.

Q. They put a thin-set after your brown? A. Right.

Q. All right.

[1107] How about the Woodridge Church? A. The Woodridge Church was all plastered throughout on ceilings and walls and behind the ceramic tile wainscots in the rooms, in the bathrooms, we scratched and browned with Portland cement.

Q. Is that in 1965? A. Right.

Q. Do you know the tile contractor? A. I do not.

Mr. Capuano: One moment, please.

Q. (By Mr. Capuano) How about the Bank of the Southwest Towers, do you recall that one? A. Yes, that was a twenty-one story office building which has all metal lath and plaster partitions throughout it. The toilet rooms were all scratched and browned.

Q. And tile— A. Behind the ceramic tile.

Q. How was the tile installed? A. It was—

Q. I mean, what method? A. I am sure it is thin-set.

Q. Do you recall the tile contractor? A. I do not.

Q. Who did this scratching and browning that you put on? A. The plasterers, my plasterers did it.

[1108] Q. All these jobs were in Houston, were they? A. Right, except for the Brazosport School.

Q. Yes. That is within the jurisdiction of 79, isn't it? A. It is.

Q. Could you tell me some other areas where you as a plastering contractor used Portland cement? A. Yes, a great many jobs at the present time, within the last few years, we have had what is called marble crete, which is a finish surface on exterior walls, curtain wall construction, that the entire wall, both inside and outside of metal studs, is covered with lath and both the inside and the outside is scratched, browned and finished with Portland cement.

Q. Stucco, too? Stucco in other places? A. Yes. The Conquistador Apartments, which is again a twenty, seventeen story apartment in Sharpstown, the entire curtain wall areas are Portland cement. It was dry wall inside and the tile was stuck there on the sheetrock, but the entire exterior of the building, practically, is Portland cement.

Q. Now, have the tile setters ever made a claim on you for the installation of your Portland cement mortar coat, the plumb coat? A. Directly, no.

Q. Now, have you seen the installation of tile in the conventional method being done? [1109] A. Over a great many years, yes.

Q. All right.

Have you ever seen tile setters actually installing their mortar setting bed? A. Yes.

Q. I am talking about the conventional method now. A. Right.

Q. And you have seen plasterers do it, of course. A. Right.

Q. And the materials are basically the same, aren't they? A. Yes.

Q. Now, could you tell me which craft does the more efficient job in the installation of the mortar coat, plumb coat, to which tile is to be installed? A. If by efficient you mean more speedily, more economically, the plasterers do. As far as the—

Q. Quality. A. Yes, the quality of the efficiency on the thing, there is practically no difference between the two of them.

Q. You mean they will both put up a plumb wall straight? A. One is just as good as the other.

Q. O.K.

Why do you say the plasterer would be more efficient, though? A. Because he uses a trowel and hawk for practically eight [1110] hours a day, whereas the tile setter puts it up one or two hours or three, maybe, and then uses the rest of his time in the installation of his ceramic tile.

Q. Now, have you as a plastering contractor received any complaints from the tile contractors about your work of your men? A. No.

Q. I am talking about the back-up for tile. A. No, I have not.

Q. Now, could you tell me in your experience in this area which craft has the area practice as far as putting up a mortar coat, plumb coat of mortar, on which tile is to be installed in the thin-set method. A. The plasterers have been doing it probably ninety per of the time, as far as I am concerned.

Q. O.K. A. I will say this, we do figure it all the time.

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Cross Examination

Q. (By Miss Thacker) Mr. Duckett, did you say you did the Southwest Towers Building? A. Yes, ma'am.

Q. Conventional method? [1111] A. As I recall it, it was thin-set, but I am not sure.

Q. Texas State Tile floated their own surface there? A. It was conventional.

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Q. Now, of your total plastering work that you do, Mr. Duckett, all of your plastering work that you do, what per cent of that total is the preparation to receive tile? A. I would hate to set a percentage on it because that is one thing we don't keep any records of. As I said, we do figure always to scratch and brown behind ceramic tile.

Q. But you don't actually know? A. I don't know exactly what that percentage of the total would be.

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[1114] ARTHUR SANDERS

was called as a witness by and on behalf of the Plasterers and, having been first duly sworn, was examined and testified as follows:

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Direct Examination

Q. (By Mr. Capuano) Mr. Sanders, by whom are you employed? A. Tobin & Rooney.

Q. And in what capacity? A. Foreman.

Q. Plastering foreman? A. Plastering foreman.

Q. Are you a plasterer by trade? A. Yes, sir.

Q. How long have you been a plasterer? [1115] A. Twenty-one years.

Q. Did you serve an apprenticeship? A. Yes, sir.

Q. Where? A. St. Louis and East St. Louis, Illinois.

Q. All right.

Now, have you run jobs for Tobin & Rooney where your plasterers performed back-up for tile? A. Practically every one of them.

Q. Every one of the jobs? A. Uh-huh.

Q. Can you give me the names of some of the jobs? A. Addition to the Jeff Davis Hospital.

Q. All right. A. That was in about '58, I imagine it was.

Q. All right.

And that is here in the Houston area? A. Yes, sir.

Q. And what type of back-up did you have there for the tile? A. Cement for thin bed method.

Q. Was it over metal lath or what? A. Metal lath and some tile.

Q. What do you mean some tile- A. Some tile block.

Q. You mean clay tile walls? [1116] A. Yes, sir.

Q. And you put over the metal lath how many coats? A. Two, scratched it and plumb coat.

Q. And how was the tile installed over that? A. Thin bed.

Q. O.K.

Do you recall who the tile contractor was? A. Texas Tile & Terrazzo.

Q. All right.

And who did the plumb coat there? A. The plasterers.

Q. Can you think of another job? A. Humble Building.

Q. Humble Building? A. Yes, sir.

Q. Where is that? A. Houston, downtown.

Q. And when was that? A. It run from '59 to about '61.

Q. All right. And tell me what you did there. A. The bathrooms were browned over gypsum and finished before they stuck tile over them.

Q. Browned and finished. What do you mean by finished? A. Finished coat, similar to these walls right here (indicating).

[1117] Q. Oh. And they put their tile to the gypsum? A. Yes, sir.

Q. You mean the gypsum white coat they put tile to, is that right? A. It wasn't a regular white coat. It was a gypsum trowel finish.

Q. Oh, I see. And they put their tile with some sort of thin-set material? A. It was a thin-set material, yes, sir.

Q. Do you recall having any problem on that job? A. Yes, we had some trouble. They had some trouble with lumpy material. It was making the corners of their tile stick out which was blamed on us.

Q. Would you tell me how you learned about this problem? A. Through the inspector.

Q. Could you explain it to me? A. The inspector checked the walls before the tile was set and then checked it after it was set.

Q. And was there any—did you have to correct any of your work? A. Occasionally we had a little to correct, not a whole lot.

Q. And what did the inspector find after he checked, before and after? A. I don't understand.

Q. Well, you say the inspector checked the walls before the [1118] tile was installed and then after the tile was installed? A. He found that the corners of the tile was sticking out due to the lumps in their mastic.

Q. Underneath the tile? A. Yes, sir.

Hearing Officer: What job was this? I missed that.

Mr. Capuano: Humble Oil Building.

The Witness: Humble Oil & Refining.

Miss Thacker: It was done in '59, you say?

The Witness: The plastering work started in that time.

Miss Thacker: The present building?

The Witness: Yes, ma'am, or '60. I don't know the exact date on it.

Q. (By Mr. Capuano) How long did you continue on that job? A. I was there a total of twenty-eight months, all told, and it started around the early part of—the last part of '59 is when we started our plastering.

Q. And how about the T.S.O. dormitory, is that right? A. T.S.U.

Q. T.S.U. dormitory? A. We scratched the bathrooms only.

Q. All right. What job is that? A. That is Texas Southern University. We did not put the plumb coat on.

Q. O.K.

[1119] And did you work on the Brazesport Hospital? A. Yes, sir.

Q. That is in Freeport, Texas, is it? A. Yes, sir.

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Q. Now, when you are on a job do you confer with the foreman or superintendent of any other crafts? A. Yes, sir, I do.

[1120] Q. Could you tell me which crafts you confer with? A. The plumbers, the superintendent, and if the tile men are on the job, check with them, see what they need.

Q. What is the purpose of this meeting with these other people? A. To see that we hold the right margins and keep everything in line so that the other crafts don't have any trouble with their walls.

Q. O.K.

Were you here during the testimony of Mr. Richter? A. Yes, sir.

Q. Did you hear the way he described how he, his plasterers, plumbed the wall and put it up, and so forth? A. Yes, sir.

Q. Would your testimony be similar to that if I asked you those same questions? A. It sure would.

Q. Now, could you tell me what percentage of the jobs that you do in an average year include back-up for tile?

A. Just practically all the jobs we do include back-up for tile.

Q. And perhaps I should have added, where tile is to be installed over your plumb coat in the thin-set method. A. It's very seldom that we get a job where we don't do the plumb work on.

[1121] Q. Where it's going to be installed in the thin-set method? A. Yes, sir.

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[1123] JOHN L. FLOWERS

was called as a witness by and on behalf of the Plasterers and, having been first duly sworn, was examined and testified as follows:

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Direct Examination

Q. (By Mr. Capuano) Mr. Flowers, could you tell me who you are employed by, please? A. Doerner Plastering Company.

Q. In what capacity? A. Foreman.

Q. How long have you been a plasterer? A. Twenty-one years.

Q. Did you serve an apprenticeship? A. Correct.

Q. Where? [1124] A. Houston.

Q. Now, how long have you worked for Doerner? A. Twenty-one years.

Q. How long have you been a foreman for Doerner? A. About eighteen years.

Q. Now, in connection with your work for Doerner could you tell me if your plasterers have prepared walls to receive tile? A. They have.

Q. Can you give me the names of some of the jobs where you have? A. Well, the last couple of jobs was the Engineering Building, University of Houston.

Q. I think we already had that one.

Was Mr. Saylors on that too? A. Well, he was the superintendent.

Q. He was the superintendent of it. All right. We have already had that one.

Can you think of another one? A. And also the Casa de Maria on Almeda.

Q. Was that the St. Anthony Home? A. Yes.

Miss Thacker: We have had that.

Q. (By Mr. Capuano) How about the Sheraton Lincoln Hotel? A. Sheraton Lincoln Hotel, correct.

[1125] Q. Is that here in Houston? A. Here in Houston.

Q. And when did you do that job? A. In '61.

Q. And could you tell me what type of work your plasterers did on that job for tile? A. We scratched and plumbed the walls for, browned the walls for thin-set tile.

Q. Was this over metal lath? A. Some metal lath, some masonry walls.

Q. All right.

When you put your brown coat on, what would the plasterers do? A. Well, we would plumb, square the walls. Of course, we worked off of the fixtures, the plumbing fixtures.

Q. Did you use screeds? A. We used screeds.

Q. Did you rod the walls? A. Rodded the walls.

Q. How was the tile set? A. Thin-set method.

Q. On top of your brown coat? A. On top of my brown coat.

Q. Do you recall when the tile contractor came to put his tile on? [1126] A. Well, while we were on the job.

Q. Well, how many days would your brown coat sit there before the tile contractor would start applying his tile, average? A. Well, if I recall correctly, I had, I imagine it was several weeks, I had quite a few of the toilet areas ready for the tile setter before they started on them.

Q. O.K.

What did you have, bathrooms, in each room of the hotel, is that what you had there? A. No, in the hotel portion all the tile was, the only tile they had was floor and a base, and this was in the office portion, six through twelve.

Q. I see.

Miss Thacker: The contractor.

Q. (By Mr. Capuano) Do you know? A. Texas State.

Q. O.K.

Now, when you are a foreman on the job do you make any contact with foremen of other crafts? A. Yes, I do.

Q. And for what purpose? A. To work together, we work together with all the crafts. We have to in cases where we, when we start the bathrooms, we work with the plumbers, the general contractor, the toilet [1127] partition people. We have to know the correct dimensions for all of these items before we start our work in order to get a good job.

Q. And— A. Have to know the thickness of the tile.

Q. Who do you find that out from? A. From the tile setters, if they are on the job, and sometimes they are because sometimes the same people are putting down the terrazzo floors.

Q. Putting down the terrazzo floors, you say? A. Correct, yes. The tile setters.

Q. The tile setters put terrazzo floors down, too? A. Some of them are terrazzo men also.

Q. Oh, I see.

And do you ever consult anybody else besides other craft foremen about job conditions? A. Well, the architect and the superintendent, we work hand in hand. If I need to know the thickness of the tile, you know, and the tile setter is not on the job, I will go to architect, he usually has a sample of the tile, for the thickness. Of course, usually the dimensions are on the plans that give us the margin we need to hold.

Q. The plans give you this? A. Right.

Q. Now, have you seen any tile installed in what we call the [1128] conventional setting bed method? A. I have. It's been quite a while ago.

Q. Have you seen tile setters putting that setting bed in, the conventional setting bed? A. The conventional setting bed?

Q. Yes. A. I have seen them in the past.

Q. And is that similar to your brown coat of mortar? A. Right.

Q. In make-up? A. Similar to our brown coat.

Q. You have seen tile setters put your brown coat on, haven't you? A. Yes.

Q. Can you tell me which craft is more skillful in putting that mortar up? A. Well, the plasterers are more skillful.

Q. Sorry? A. The plasterers, I think, are more skillful.

Q. Why do you say that? A. Well, they do it faster and they do as good a job.

Q. Now, would you tell me what percentage of the jobs you do in a year include back-up for tile, in other words, the brown coat, where tile has been set in the thin-set method? A. Well, I could say the jobs I have done in the past [1129] several years, a hundred per cent.

Q. And who did the work on those jobs? A. The plasterers.

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Cross Examination

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Q. Yes. Now, let's see if you understand me. Of all of the plastering work that you do, now, this is inside and outside, [1130] everything, all of the plastering work that you do, would you be able to give any kind of an estimate of what amount is for preparation to receive tile only? A. Well, I understood the question.

Q. Did you? A. I will say forty per cent last year. Now, it's not that way all the time, but last year I was on one job last year.

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[1163] WALTER C. GILLESPIE

was called as a witness by and on behalf of the Plasterers and, having been first duly sworn, was examined and testified as follows:

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Direct Examination

Q. (By Mr. Capuano) Mr. Gillespie, would you tell me what your craft is, please? A. I am a plasterer.

Q. All right. And how long have you been a plasterer? A. Twenty years.

Q. And by whom are you employed? A. Tobin & Rooney.

Q. As a plasterer? A. As a plasterer?

Q. And did you serve an apprenticeship as a plasterer? A. Yes.

[1164] Q. Where? A. In Houston, Texas, Plasterers Local 79.

Q. All right.

And in connection with Local 79 do you have any other job or position besides being just a plasterer for Tobin & Rooney? A. I am a plasterer apprentice instructor.

Q. Plasterer— A. Plasterer apprentice instructor.

Q. How long have you held that position? A. Four years.

Q. And how many apprentices do you have right now in your program? A. Fourteen.

Q. O.K.

Now, would you tell me, do you have any—well, let me do this first—

Miss Thacker: May we go off the record just a minute?

Hearing Officer: Off the record.

(Discussion off the record.)

Hearing Officer: On the record.

Q. (By Mr. Capuano) Mr. Gillespie, could you tell me approximately when you went through the apprentice program? A. I started in February 1947.

Q. All right. [1165] A. And served three and a half years.

Q. All right, sir.

Now, in connection with your apprentice program—let me ask you this first, do you know if your apprentice program has any type of federal government approval? A. Yes, sir.

Q. What agency or department is it approved by? A. The Joint Apprenticeship Committee of the U. S. Government.

Q. All right.

Is that under the Labor Department? A. Yes, sir.

Q. The Bureau of Apprenticeship Training? A. Yes, sir.

Q. Now, could you tell me, your apprentice program, is that run solely by the Local? A. Yes, sir, with the state and city school.

Q. Do you have any sort of committee which oversees your work? A. Yes, sir, we have a Joint Committee.

Q. Joint Committee composed of whom? A. The plasterers and the plaster contractors.

Q. All right.

And is this committee set up as a result of any agreement between the Union and the contractors? [1166] A. Yes, sir.

Q. And do they have an apprenticeship trust agreement? A. Yes, sir.

Q. And, now, could you tell me whether you have—

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Q. (By Mr. Capuano) Now, in connection with your program could you tell me whether you have certain rules and procedures by which you go, selecting your apprentices? A. Yes, sir.

Q. I show you an exhibit marked P-24 and ask you if you can identify that for me? A. These are the procedures by which we go in selecting our apprentices.

Q. These are the procedural rules? A. Yes.

Q. Do you have or do you comply with any other procedural rules bessides your own, any sponsored by the government? A. This was set up with the aid of a government man, and by the Bureau of Labor standards.

Q. By government man you mean the federal government? A. Yes, sir.

Q. They have representatives assist you, is that what you are [1167] saying? A. Yes, sir.

Q. Are they from the Bureau of Apprenticeship Training? A. Yes, sir.

Q. Now, I am going to show you P-25 and ask you if you can identify that for me? A. That is an application for plasterers' apprenticeship.

Q. All right.

And who fills that out? A. The boy that is making application.

Q. To come into your program? A. To come into our program.

Q. And after he fills out that application what is the next step in gaining admission? A. Then we issue him a slip an dhe takes it to the Texas Employment Commission and takes an aptitude test.

Q. I show you what has been marked P-26 and ask you if you can identify that? A. That is the thing that he takes, the piece of paper that he takes to the Texas Employment Commission.

Q. All right.

And what happens at the Texas Employment Commission with this boy or why do you send him there? A. It's to test his ability to use his hands. It's, like I say, an aptitude test. And after he has taken the test it is [1168] graded and sent back to Local 79.

Q. All right.

And I show you P-27 and ask you what that is? A. That is the grade sheet that we use when we are interviewing an apprentice personally. He has to appear before the Apprenticeship Committee for an interview, personally.

Q. Now, is the score on the aptitude test put on this apprentice rating form? A. Yes, sir.

Q. That is P-29, correct?

And then would you tell me what else is put on this rating form? A. Well, we go by this—this is P-27.

Q. I am sorry, P-27. Excuse me.

Wait a minute. Are you sure?

Yes, it is. O.K.

Go ahead, tell me what you put on it. A. As we talk to him, his attitude, the general feelings toward our trade or our craft, and as it says here, we give him the score of his aptitude test, plus others. He has to have a ninth grade education in order to fill out an application. And then his armed force, if he is a veteran or if he has had military service or not.

Q. All right. A. All of these things are concerned.

[1169] Q. Now, after this will the boy be admitted or rejected to the program? A. Yes, sir.

Q. And do you keep a record of that, too? A. Yes, sir.

Q. Do you have a big book? A. Yes, sir.

Q. All right.

Now, after the boy had been admitted to the program, what obligations does he have as far as training? A. He is required to attend school four hours one night each week, and then he has his on-the-job training.

Mr. Capuano: Would you mark that, please?

Miss Thacker: How many hours?

The Witness: Four hours a week.

Miss Thacker: Four hours a week.

(The document above-referred to was marked Plasterers' Exhibit No. 30 for identification.)

Q. (By Mr. Capuano) Now, I show you what has been marked P-30 for identification and ask you if you can tell me what this is? A. It is a guideline that I use in teaching the apprentice boys at the school.

Q. Are these minimum standards? A. Minimum standards that the U. S. Labor Department has put [1170] out.

Q. O. K.

And your program is, what did you say, three and a half years? A. Yes, sir.

Q. And the boy has to go to school one hour or four hours a week? A. Four hours a week.

Q. Four hours for the three and a half years? A. For the three and a half years.

Q. And then he has on-the-job training too, is that right? A. Yes, sir.

Q. He has to work continuously during that period? A. Yes, sir.

Q. All right.

Now, does the apprentice program or you, as an apprentice instructor, keep records as to the type of work that the boy does on the job during this three and a half year period? A. Yes, sir.

Q. I show you what has been marked P-28 and P-29 and ask you if you can tell me what those two exhibits are? A. The P-28 is a book that the boy carries on the job and is recorded in there each and every thing that he does every day. This book is designed to hold a year of his work. Then every week I have this copy, P-29.

[1171] Mr. Capuano: Didn't I give you one?

Miss Thacker: No.

(A document was handed to Miss Thacker by Mr. Capuano.)

A. It's a record, I have a copy of it and keep it for my own records. I also have a copy that I send to Local 79.

Q. (By Mr. Capuano) All right.

And do you put the information on P-29 from the information contained in P-28? A. Yes, sir.

Q. And who fills in P-28? A. The boy himself, fills in what he does each day. At the end of the week the plasterer foreman signs it. It has a place for the plasterer foreman to sign it.

Q. O. K. A. And when he brings it to school it also has a place for the instructor to sign it, and he is given a grade.

Q. O. K.

Now, I notice, for example, taking the—it actually would be Page 5 of P-28, it's not numbered Page 5 but it's the first section that starts out with the blocks where you fill in. A. Yes, sir.

Q. Do you see that? A. Yes, sir.

[1172] Q. And over in the left-hand margin there are various letters of the alphabet beginning with A through M. Could you tell me whether those—what those letters mean? A. Yes, sir, they designate the type of work that this boy does during the day from scratch, brown, as you see, it's lettered.

Q. And is the identification of those letters listed on the previous page? A. Yes, sir.

Q. And then, for example, we have various numbers across the top of Page 5 on horizontal lines, and could you tell me what those numbers indicate? The days of the month? A. Those represent the days of the month.

Q. And then the boy puts in the letter for the type of work he did that day, is that the idea? A. Yes, sir.

Q. I see.

And then you take it off and put it on P-29, is that correct? A. Yes, sir.

Q. And you keep this record, P-29? A. Yes, sir.

Q. And what is the purpose of you keeping P-29? A. We keep our records so that we can determine if the boy is spending too much time on one thing. I mean, continuously, [1173] day after day after day. Such as scratching for six or eight months at a time. Then that way we know if he needs a change, if we feel, if the apprentice feels he needs a change, say, to browning or marble crete or finish work.

Q. You can keep track of his progress? A. Yes, sir.

Q. All right.

Now, could you tell me in connection with your classroom work where does this boy go to attend this one-hour or four hours per week? A. We have a school on the

corner of Smith and Bell Street which is classified as a shop.

Q. All right.

And what do you do in there with the apprentices? A. I teach them the different parts of the craft, of this craft. I teach them how to square and plumb a wall, how to scratch, brown, how to lay out for cornice work, how to miter, how to use a water level.

Q. Go ahead. Continue. A. I teach them math and the intricate parts of plastering, job relations.

Q. Do you do anything with blueprints? A. Yes, sir, we teach them blueprints, how to read them, how to search out the details on the job as to what one specific wall might get, so on and so forth.

[1174] Q. What is a water level? A. A water level is a piece of plastic hose or any type of hose. It has two clear glass places like on a boiler, and water is put in there and it's used to level a ceiling.

Q. All right.

Do you teach them anything about squaring rooms? A. Yes, sir.

Q. What do you teach them about squaring rooms? A. I teach them how to square a room, how to plumb it.

Q. What method do you use to teach them how to square a room? A. I use three different methods.

Q. You teach them three different methods? A. Yes, sir. I teach them to use a regular wooden square, the right-angle triangle method, and the center line method.

Q. Now, in connection with your classroom work, are there texts or books that you use? A. Yes, sir.

Q. What books do you use, can you recall offhand? A. I use the "Practical Plastering Skills" by Brandon and Knowles. Also the book by Dalton. It's for plasterers and cement masons. I use a blueprint book. I believe it's by Dizell.

Q. What materials are the plasterers taught to work with? A. We are taught to work with lime and guaging plaster, [1175] molding plaster.

Q. Gypsum? A. Gypsum plaster, and cement.

Q. And what do you mean by cement, Portland cement? A. Portland cement.

Q. How about keen cement? A. Yes, sir.

Q. Anything to do with acoustics? A. Acoustics, troweled acoustics, blown acoustics, acoustic block.

Q. All right.

What tools do the apprentices use in their training? A. Hawk and trowel, level, a square, plumb bob, chalk line, miter tools, pointing trowel and margin trowel.

Q. Square? A. Yes, sir.

Q. Ruler? A. Yes.

Q. Now, is there anything taught the apprentices in connection with their relation on the job with other trades? A. Yes, sir.

Q. Could you tell me what you teach them in that connection? A. Well, we teach them how to cooperate with each of the other crafts. We are closely connected with the lathers, the plumbers, the tile men. Lots of times the acoustic ceiling [1176] block men.

Q. All right.

And in what way do they have to cooperate, say with the plumber and the tile setter? A. Well, on the plumber, when he sets his fixtures, lots of times he gives us a measurement that he has to have to work by, and the tile setters, we have to plumb and square their work to see that it is right.

Q. Now, in connection with—well, you teach them how to apply—let's take a wall of Portland cement plaster that tile is going to go on. A. Yes, sir.

Q. Do you understand me? A. Yes, sir.

Q. All right.

You teach them to put on a scratch coat, would you? A. Yes, sir.

Q. Then a brown coat? A. Brown coat.

Q. And how would you teach them to put on the brown coat? A. Teach them to run screeds on their wall, be sure that they are plumb. If it has to come over another wall then it must be square.

Q. O. K.

Then they would fill in between the screeds? [1177] A. Block in with a hawk and trowel, apply their mortar between the screeds.

Q. What would they do after they put the mortar between the screeds? A. Between the screeds, they rod it and darby it or shingle float it.

Q. O. K.

Now, in connection with your classroom work, do you do practical plastering work right in your shop or your classroom building there? A. Yes, sir.

Q. Could you tell me how you go about it, I mean, you have some sort of mock-up or something that the boys work on? A. Yes, sir, we have a room built there that is twenty by twenty.

Q. And they work on that? A. They are working on that, yes, sir.

Q. Now, in connection with your teaching the apprentices the plastering trade, do they have to do any elaborate type work or do you teach the many elaborate molding or crafting? A. Yes, sir.

Q. Could you explain that to me, what you do teach them in that connection? A. I teach them how to take a mold off a blueprint, how to cut out the template, how to hoist the mold, how set it up, [1178] how to lay it out and how to run it.

Q. These are molds made out of plaster or— A. These are molds that are made out of plaster and are run in place with a template.

Q. And what are they building here, cornices and things? A. Cornices.

Q. Where would you use those? A. Theaters, hotel lobbies. They could be used any place.

Q. Are those what we see sometimes near ceilings, elaborately carved things running around ceilings or around the center light fixtures in theaters, is that what we are talking about? A. Yes, sir.

Q. And your boys are taught that work? A. Yes, sir, they are also taught how to cast molds of things. Suppose someone wants an elaborate piece of work, then they know how to cast it and make it right in place on the job.

Q. They can cast the mold right there? A. Yes, sir.

* * * * * * * * *

Q. (By Mr. Capuano) I show you what has been marked P-31 and ask you if that is the Dalton book that you said you use in your program? A. Yes, sir.

[1179] Q. And does this book show some of that, the type of work that you teach the apprentices to do? A. Yes, sir.

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[1187] PURL GUY THOMPSON

was called as a witness by and on behalf of the Plasterers and, having been first duly sworn, was examined and testified as follows:

* * * * * * * * * *

Direct Examination

Q. (By Mr. Capuana) Mr. Thompson, are you a plasterer? A. Yes.

Q. And by whom are you employed? A. Tobin & Rooney.

[1188] Q. In what capacity? A. As a foreman.

Q. And how long have you been a plasterer? A. Twenty years.

Q. And approximately how long have you been a foreman? A. About, approximately eight.

Q. And has that all been for Tobin & Rooney? A. Yes, sir.

Q. Now, in connection with your work as a plastering foreman for Tobin & Rooney have you installed jobs where your plasterers put up the plumb coat of mortar for the installation of tile? A. Yes, sir.

Q. Did you do the work on the Humble garage? A. Yes, sir.

Q. And is that here in Houston? A. Yes, sir.

Q. Approximately when was that? A. That was appromately '62.

Q. And what work did your plasterers do there behind the tile? A. We scratched it over the wire, metal lath, and then it was a lot of masonry walls, which we put the one coat of brown coat on.

Q. And then how did the tile setter put on his tile? [1189] A. It was the thin-set method.

Q. Over your brown coat?

Hearing Officer: Who was the tile contractor?

The Witness: Texas State and Terrazzo.

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[1207] JOSEPH T. POWER

was called as a witness by and on behalf of the Plasterers and, having been first duly sworn, was examined and testified as follows:

Hearing Officer: Would you give the court reporter your name?

The Witness: Joseph T. Power.

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[1208] Q. (By Mr. Capuano) Mr. Power, will you please tell us what your position is? A. Executive Vice-President, Plasterers and Cement Masons International Association.

Q. And is that the International Union to which Local 79 is a subordinate body? A. Yes, sir.

Q. Where is your office? A. Washington, D.C.

Q. All right.

Could you tell me in connection with your job as Executive Vice-President what are your duties? A. Assist the general secretary-treasurer and general president, also serve as secretary of the National Apprenticeship Committee.

Q. All right.

I show you what has been marked P-30 and ask you if in connection with your position on the National Apprenticeship Committee you had anything to do with the preparation or promulgation of P-30? [1209] A. Yes, sir.

Q. Would you tell me what that is? A. Well, this committee is made up of contractors and also officials of the Plasterers International Union. I serve as secretary of the committee between the two organizations, namely, the Plastering Contractors Association, the Plasterers and Cement Masons International Association. We drew up these specifications which were in turn submitted to the Bureau of Apprenticeship Training, Department of Labor, and they in turn printed these and we circulated them throughout the United States to our local unions.

Q. All right.

Now, did you, yourself, go through an apprentice program? A. Yes, sir, I did.

Q. Was that a plasterers' apprentice program? A. Yes, sir.

Q. You are a plasterer by trade? A. Yes, sir.

Q. Where did you go through your program? A. Chicago, Illinois.

Q. Now, I show you what has been marked as T-20, and ask you if the Plasterers' jurisdiction is set out in that Constitution? A. Yes, sir, it is.

Q. Could you tell me what page? [1210] A. 117, Section 118.

A. And could you tell me if it includes the preparation of walls to receive tile? A. It most certainly does.

Q. What is the number of that exhibit? A. T-20.

Q. Now, could you tell me generally what the conventional method of setting tile is over metal lath? A. Yes, the plasterer would apply the first coat or scratch coat of mortar to the wire lath to stiffen the base so that the second coat, which is called the brown coat, or plumb coat, can be applied. This brown coat is a true and plumb coat and is there for the tile setter then to apply a setting bed.

Q. The plasterer to apply the brown coat and then the tile setter to apply his setting bed for his tile? A. Yes.

Q. And his setting bed would be made of what? A. In the conventional method, Portland cement.

Q. And any other materials? A. Sand.

Q. Sand? A. Basically the same material as what the plasterer would apply in the scratch coat and brown coat.

Q. I see.

[1211] Then in the thin-set method over metal lath what would be the situation there? A. The plasterer would prepare the wall by plumbing it, by rodding it and squaring it, and after that operation is completed the tile setter would come in with a material similar to Tec, L. & M. or Crest, which would be his setting bed to set his tile.

Q. How would the plasterer, what coats would the plasterer use to plumb, rod and square? A. Well, if it was on wire lath he would have to scratch it. If it was on a masonry foundation he would only have to put the one coat on, the brown coat.

Q. And over a metal lath he would put the brown coat over the scratch, is that right? A. That's right.

Q. Now, Mr. Power, did you cause some pictures to be taken depicting the installation of tile in these two methods? A. Yes, sir, I did.

Q. Were you present when the pictures were taken? A. Yes, sir, I was.

Q. Did you make notes on the back of the pictures since then? A. Yes, I have.

Mr. Capuano: May we go off the record for a moment?

Hearing Officer: Off the record.

[1212] (Discussion off the record.)

Hearing Officer: On the record.

Mr. Capuano: Will you mark these, please?

(The documents above-referred to were marked Plasterers' Exhibits Nos. 34-A through 34-O for identification.)

Q. (By Mr. Capuano) Mr. Power, I show you these exhibits marked 34-A through -O and ask you if these are the pictures that were taken at your direction? A. Yes, sir.

Q. Could you tell me where they were taken? A. They were taken in the Apprenticeship School in the District of Columbia, Washington, D.C.

Q. Apprenticeship School of what craft? A. The Plastering Apprenticeship School.

Q. And is the boy we see depicted in these pictures, who is he? A. He was one of the apprentice plasterers.

Q. All right.

Attending the school? A. Yes, sir.

Q. And, of course, you appear in many, if not all, of them, don't you? A. Yes, sir. I think I am in every one of them.

Q. Now, did you use an actual wall or what did you use in [1213] these pictures? A. It's a mock-up of a wall.

Q. All right.

Now, I am going to show you P-34-A and ask you to tell us what that is. A. Well, this mock-up of a wall shows wire lath being attached to a two-by-four wood frame. It could have been attached to metal studs. However, in this case, to expedite what we are trying to show here, it was put on wood studs and this is wire lath, and it shows the apprentice plasterer getting ready to apply the first coat or scratch coat of mortar to the wall.

Q. All right.

And did you make notes on the back which basically said what you just testified to? A. Yes, sir.

Q. Describes what the picture is, is that right? A. Yes, sir.

Q. All right.

Now, I show you P-34-B and ask you what that depicts. A. Well, this shows the apprentice boy applying the first coat of Portland cement mortar, which is known as the scratch coat.

Q. And what is the purpose of that scratch coat that he is applying on there? [1214] A. Well, the purpose of the scratch coat is to stiffen the wire so that the second coat or the brown coat, or plumb coat, can be applied.

Q. All right.

And I show you P-34-C, and ask you what that picture depicts. A. Well, this picture depicts that the entire area was scratched in with Portland cement mortar, the first coat, and the boy, the apprentice plasterer is using a scarifier to scratch the surface.

Q. Now, I show you what is marked as P-34-D and ask you what that depicts. A. Well, this depicts that the scratch coat has been put on and now the plasterer is getting ready to put in his screeds and plumb the surface.

Q. Now, would he immediately begin putting on those screeds right after he put on the scratch coat or has there been some time lapse in your pictures here? A. Well, you have to understand there is a time lapse in here. The lines have been established by squaring the room, whether he had used the right angle method, three, four, five, six or eight, ten, or whether he had used the method of, the center line method of squaring the room, and what he is doing there is actually bringing up a plumb line from the floor up the wall. In other words, if this picture had shown the wire [1215] lath running down to the floor you would see that he would be bringing that line all the way up. However, at this point he is just putting the mortar on.

Q. He is making the screed out of mortar? A. Making the screed out of mortar. He could have taken a wooden block, put a dab of plaster on the wall in the corner first, stuck a wooden block in there, which would be the line on the floor, and then plumb up another, up to another block up at the height of the straight edge by putting a dab at the top, making those two plumb, and then take this mortar fill in between the two blocks, press his straight edge in and form his plumb screed.

Q. Are you saying he could use wood to make a screed, is that what you mean? A. Yes, he could.

Q. All right.

And here he is putting on a vertical screed, is he? A. That's right.

Q. And it's assuming that the wall has been plumbed, plumber to the floor, and squared, is that right? A. That's right.

Q. And I show you P-34-E and ask you what that is? A. That shows the boy taking a straight edge and a level and plumbing that screed.

Q. The vertical screed he just applied? [1216] A. Right.

Q. I show you P-34-F and ask you what that shows. A. This shows the boy moving down the wall and again this being a mock-up, you have got to visualize that he has moved these down to the length of this straight edge, and he is now putting in another screed the length of that straight edge, which is also again taken from the plumb line to bring that wall true and plumb.

Q. This is parallel to the other vertical screed? A. Yes, sir.

Q. Now, I show you P-34-G and ask you what that represents? A. This, again being a mock-up, this shows that the plasterer apprentice is screeding off horizontal screeds.

Q. And they meet the two vertical screeds? A. They meet the two vertical screeds.

Q. Is there one at the top and one at the bottom? A. One at the top and one at the bottom.

Q. Is he doing anything else there besides just putting on these creeds? What is the boy actually doing? A. He is taking a straight edge now and rodding from one plumb screed to another plumb screed to get in the horizontal screed.

Q. And what is he using on the rod? A. Well, there is a level on the rod at that point, but he is not using it there.

[1217] Q. O.K. A. See, the level is attached to the rod so that he can plumb the wall and be sure that it's true.

Q. I see. O.K. I show you P-34-H. A. Well, this shows the Plasterer applying Portland cement motar in between the screeds. In other words, he is filling in now or flanging in the mortar, and you will notice it's going over the scratch coat.

Q. That he applied earlier? A. That he applied earlier.

Q. O.K.

And I show you P-34-I and ask you what that picture shows? A. This shows the plasterer again flanging in the wall area in between the screeds which have been plumbed.

Q. And P-34-J. A. This shows the apprentice boy with his straight edge and a level checking the plumb of his wall.

Q. O.K. A. You have got to remember that this has all been squared off another wall or at least we are making believe that it has for this mock-up presentation.

Q. O.K. And I show you P-34-K. A. This shows the apprentice boy holding a scratcher in his hand and scratching the second coat or plumb coat of mortar [1218] which is for the setting bed for the tile setter.

Q. You mean the setting bed will go on top of that? A. The setting bed on the conventional method now will go on top of that.

Q. And I notice that you did not or he did not carry the plumb coat all the way over. Is that so we could still see the scratch coat in there? A. The scratch coat and the second coat or plumb coat of mortar.

Q. O.K. A. Brown coat.

Q. Now, I show you P-34-L and look at that and tell me what is now happening. A. Well, you will have to assume from this picture now that this is where the work operation has stopped and this—

Q. You mean as far as the plasterer is concerned? A. As far as the plasterer is concerned. This is what the plasterer has from the 1917 agreement in his jurisdiction, the scratch coat and the brown coat for the plumbing,

rodding and squaring of walls. And he would stop at this point.

And this plasterer apprentice here is acting as a tile setter and the purpose of this is to show the function of what a tile setter would do at this time.

Q. All right. And are you talking of P-34-L? A. Right.

[1219] Q. Now— A. He is putting on his wood screeds, which are to maintain the plumbness for his tile.

Q. What are those wood screeds made of? A. It looks and appears to be, and I know what it was, it was a lattice strip, probably three-sixteenths of an inch.

Q. All right.

This plasterer apprentice is putting them on but he is doing it as if he were a tile setter? A. That's right, because we don't claim that.

Q. O.K.

Now, would the tile setter come immediately after you put on your brown coat to put his screeds on or would there again be some time? A. There would be a time lapse involved.

Q. What would have to happen to your brown coat? A. It would have to get firm and set for him.

Q. O.K.

Now, I show you P-34-M and ask you what that picture depicts? A. Well, this depicts again the first and second coat, plumb coat, that the plasterer applied in a certain section, now has been rodded in between the strips to show that this is the setting bed which the tile setter would set his tile in. That is the upper portion of the picture.

[1220] Q. Just a moment. I am going to have you mark something there.

Now we are talking in P-34-M about—this would be a conventional method installation, right? A. This is a conventional method of applying tile.

Q. All right.

Now, put an A on P-34-M, capital A, in the area that still shows the scratch coat. A. Are you referring to the plasterer's first scratch coat?

Q. Yes. A. (Witness complied.)

Q. All right.

And put a B in the area that shows the plasterer's plumb coat. A. Right. (Witness complied.)

Q. And put a C in the area which shows the tile setter's setting bed. A. (Witness complied.)

Q. You did? A. Yes, sir.

Q. O.K.

Now, I show you P-34-N and ask you what that depicts? A. This depicts again the plasterer apprentice acting as a tile setter, and he is now setting the tile into the setting bed.

[1221] Q. That he would apply, that the tile setter would apply, is that what you mean? A. That's right, yes.

Q. And would the tile setter normally start in the middle of a wall, as we have it here? A. Oh, no, this again is just a mock-up, and it's to show what is happening.

Q. O.K. A. And the operations.

Q. Now, I show you what has been marked as P-34-O and ask you if you can tell me what this is, now? A. Yes, this shows a thin-set of mortar being applied over the plasterer's plumb coat, and that thin-set of mortar is the setting bed which is used to set the tile.

You have in this picture a first coat, a scratch coat, because of it being wire lath.

Q. Now, would you mark that with an A in the scratch coat? A. (Witness complied.)

Q. Now, who would put that coat on? A. The plasterer would apply that coat.

Q. All right.

Now, this picture is now depicting the thin-set method, is that right? A. Yes.

Q. Of installation of tile? [1222] A. Yes.

Q. All right.

Now put a B on the plasterer's plumb coat. A. (Witness complied.)

Q. And put a C on the thin-setting bed. A. (Witness complied.)

Q. O.K.

Now, we show that and apparently there is a piece of tile imbedded in the thin-setting material. A. That's right.

Q. O.K.

And the thin-setting bed material is the white part of the picture? A. That's right, it's material similar to Tec, L. & M. or Crest, or any of the other setting bed materials used to set tile.

Q. Now, I notice that C has, the white area, the thin-set material, as you called it, has a lot of lines in it. What caused those lines? A. It was put on with a serrated edge trowel.

Q. I see. O.K.

Now, I notice B is scratched. Is that— A. Well, there is a purpose for that because if the specifications were changed from a conventional method of setting tile to a thin-set method the scratch coat, the [1223] scratches were in there for the conventional tile.

Q. I see. A. Conventional method of setting tile. I wouldn't scratch it if it was going on a thin-set and you knew it beforehand.

Q. I see. A. But—

Mr. Shepherd: Can we see them when you get through?

Mr. Capuano: Yes.

Hearing Officer: These were introduced, or they were marked, they haven't been received as yet.

Mr. Capuano: Yes.

Hearing Officer: Do you want to receive them?

Mr. Capuano: Yes, I would. You know, I usually wait until the end, but I would like to move the admission, since I am going to have a lot of exhibits, I think it would be just as well to move their admission as we go along. I would like to move the admission of 32—

Hearing Officer: 34-A through -O.

Mr. Capuano: 34-A through -O.

Hearing Officer: Are there any objections to the receipt of these exhibits?

Miss Thacker: No objection.

Hearing Officer: They are received.

(The documents above-referred to, heretofore marked Plasterers' Exhibits Nos. 34-A through 34-O, were received in evidence.)

[1224] Mr. Capuano: May I use them? I want to ask him some more questions about them, if I may.

Miss Thacker: Do you want all of them?

Mr. Capuano: Yes, I would. I will give them right back. I am just going to ask a couple of questions.

Miss Thacker: Oh, I thought you were through.

Q. (By Mr. Capuano) Now, Mr. Power, looking at 34-N and -O, is there any difference in the work that the plasterers would perform up to the point of the tile setter putting in the setting bed, mortar setting bed, in 34-N and up to the point the tile setter putting in the setting bed in 34-O, other than the fact about the scratching, now, you told us about in 34-O? A. No.

Hearing Officer: Now, these are being offered to depict the procedure that is used up through the laying of tile?

Mr. Capuano: That's right.

Hearing Officer: It doesn't purport to show any skills or anything of that nature?

Mr. Capuano: No, it doesn't purport to show the skills.

The Witness: No.

Hearing Officer: O.K.

Q. (By Mr. Capuano) Now, are you familiar with the 1917 agreement in the green book? A. Yes, sir.

Q. That is in T-4. If you will get it out there.

[1225] Now, could you tell me whether the two methods we just described are included, are covered by that agreement, of setting tile, I mean? A. Yes, sir.

Q. And could you tell me on what you base that statement? A. Well, for the simple fact that the agreement

provides that the plasterers shall prepare all walls and ceilings which are to receive tile, and they have to plumb, rod and square the wall before the tile can be set.

Q. That would be thin-set as well as the conventional, then? A. Yes, sir, it would, because again the agreement specifically states that the plasterers shall plumb, rod and square the walls which are to receive tile.

Now, if they are going to stick tile over wallboard or some other material, he puts on his thin-set mortar bed, sticks his tile. We have no claim for it whatsoever.

Q. By he you mean the tile setter? A. Tile setter.

Q. Now, Mr. Power, are you a regular member of the Joint Board? A. Yes, sir, I am.

Q. We are talking about the National Joint Board for the Settlement of Jurisdictional Disputes, is that right? A. Yes, sir.

Q. When did you become a regular member? A. About twelve days ago.

[1226] Q. April 1? A. April 2, I think it was.

Q. Of 1967? A. Of this year, yes, sir.

Q. Now, since the reorganization of the Board have you served in any other capacity? A. I served as an alternate member.

Q. Now, could you tell me when the reorganization took place, approximately? A. It happened in a ceremony in the White House on February 2, 1965.

Q. All right.

And in connection with the reorganization of the Joint Board could you tell me what changes were made over the old board into the new board? A. Well, the old board required that a contractor in making an assignment of work was obliged to make his assignment in accordance with decisions of record, agreements of record, trade practice, and the area practice. That portion of making assignments was carried over to the rejuvenated board. However, the Joint Board in awarding a decision no longer was obligated to make decisions in accordance with decisions of record, agreements of record, trade practice, or prevailing practice, or area practice in the area.

Q. Now, do you mean in that order they no longer had to do it? [1227] A. That is correct. They were obligated to give consideration to the public and serve the best interests of the construction industry and give equal weight to efficiency and economy, and if any one of these four or five items I just mentioned was felt to be the method of resolving the picture, that would be their decision.

Q. And prior to the reorganization the Joint Board was required to go down the line using each one in order? A. Right, yes, sir.

Q. What would be the first one, decisions of record? A. Decisions of record, agreements of record. If there was no agreement of record then they would go to trade practice and if there was a gray area there they would go to area practice.

Q. And now they can use any one that they want? A. Any one that they want.

Q. O.K.

Now, was there any change in the number of members, board members? A. Yes, the Board was reduced from sixteen down to eight. There are four labor members on the Board, two regulars, two alternates, and there are four contractors on the Board, two from the A.G.C., and then from the specialty and mechanical trades, and that constitutes the Board. The alternate members—

Q. Wait. How many are on the Board now, eight or four [1228] A. Four. There's two regular and two alternate for each group.

Q. You mean two labor representatives and two employer representatives? A. Right, and each labor group has an alternate.

Q. And each employer group has an alternate? A. Has an alternate, yes, sir.

Q. So there are four regular members and four alternates? A. Yes, sir.

Q. Now— A. In other words, the Board was reduced from sixteen and a chairman down to eight and a chairman.

Q. Now, were there any other changes? A. Yes, there were.

Under the old system in case a disputant union was not satisfied with the decision of the National Joint Board they could request a reconsideration of the case or they could ask for an oral hearing, and they had to go back to the very same men who heard the case the first time.

Under the new formation of the Board they set up an Appeals Board which a local union who is still not satisfied with a decision of the Board can appeal to this Appeals Board. He still has the right, if he desires, to ask for reconsideration or an oral hearing from the Joint Board, but he has this added step, to take his case directly to the Appeals Board.

[1229] Q. And can employers appeal to the Appeals Board, too? A. Yes, sir.

Q. Who is the chairman of the Appeals Board? A. Mr. Dunlap, John Dunlap.

Q. Now, is he representing either management or labor on the Board? A. He is the impartial chairman of the Board.

Q. And how many other members are there? A. The same make-up as what constitutes the National Joint Board.

Q. O.K. A. Four from labor and four from management.

Q. Now, could you tell me generally how the disputes go before the Joint Board, or gets before the Joint Board? A. Yes, sir. A dispute arises in a given area. The local business agents are first to try to attempt to resolve this dispute, themselves. In the event the business representatives in that area are unable to resolve the dispute it is referred, then, to the International Association. Most international unions have a filing form which they require local unions to submit, which gives them the information regarding the dispute.

Once the filing form comes into our office, we then send a telegram to the other international union asking them

to assign a representative of their choosing to meet at the job site with the representative from our organization. And they [1230] go to the job site and try to attempt to adjust this dispute.

If they are unable to adjust the dispute, we are notified and we then take the case and process it before the National Joint Board. We do that by writing a letter to the Chairman of the Joint Board outlining in it in detail to him the name of the job, the contractors involved, and the basis of the dispute and the reason why we are claiming them, and asking him that he place that dispute on the agenda of the next meeting of the National Joint Board.

The Joint Board receives the dispute and the Chairman of the Board through his office then notifies the other international union that the union requesting the decision, that the union requesting the decision has asked for the decision to be placed on the agenda of the next meeting, and they are requested to submit their information regarding the dispute.

The Joint board Chairman of the Board again through his office personnel writes to the contractors involved, asking him, or them, the general contractor and the prime contractor, for their position regarding the dispute.

So that you have, then, all interested parties to the dispute having the opportunity to present their position before the Joint Board.

Q. Now, would the Joint Board notify an employer who was not bound by the Joint Board procedures? A. Yes, they would.

[1231] Q. Now, your union, is that bound by the Joint Board? A. Yes, it is.

Q. Do you know whether the B. M. & P. I. U. is bound by the Joint Board? A. Yes, they are, and all unions affiliated with the Building and Construction Trades Department are bound by it.

Mr. Capuano: Would you mark this, please?

(The document above-referred to was marked Plasterers' Exhibit No. 35 for identification.)

Q. (By Mr. Capuano) I show you what has been marked P-35 and ask you if you can tell me what that is. A. This is the Constitution of the Building and Construction Trades Department of the AFL-CIO.

Q. Now, could you tell me why you say all unions affiliated with the Building Trades Department are bound by the Joint Board? A. Yes, because Article X in the Constitution of the Building and Construction Trades Department requires that any organization affiliated with the Department must use the National Joint Board as its vehicle to resolve disputes. I don't have the exact phraseology, but when I find it I can give it to you.

Q. Page 28, is that right? A. That's right.

Q. All right.

Now, could you tell me if the Joint Board will decide a [1232] dispute, jurisdictional dispute, between two unions even if the employers are not bound or stipulated? A. Yes, they will because the local unions affiliated with the International Unions are stipulated to abide by the provisions of the National Joint Board for the Settlement of Jurisdictional Disputes.

Q. In accordance with what you just quoted from the Buildings Trades Constitution— A. Yes, sir.

Q. —or stated about it? A. Yes, sir.

Q. Now, you mentioned earlier decisions of record and agreements of record.

Would you take decisions of record first and tell me what they are? A. Well, decisions of record are applicable to all crafts. Agreements of record are only applicable to the two unions involved.

Q. And are agreements of record and decisions of record published any place? A. They are published in what is known as the Green Book.

Q. So would you look on page 104 of T-4? Do you see it? A. Yes, sir.

Q. Is that the decision of February 21, 1924? A. Yes, sir, it is.

[1233] Q. And that is the decision we have been discussing here during this case? A. Yes, sir.

Q. And is that what you just described as a decision of record? A. That is what is known as a decision of record.

Q. And the 1917 agreement on Page 32 would be what? A. An agreement of record applicable only to the B. M. & P. I. U. and the O. P. & C. M. I. A.

Q. Now, would you be able to tell me approximately how many cases the Joint Board decides in a year, average year, say, since the reorganization? A. About four hundred cases a year.

Q. They render four hundred decisions, then? A. Yes, sir.

Q. Now, are there any revisions on your voting in a case in which your union is involved? A. I have no vote. I can't be in the room.

Q. Could you explain this a little more for me, please? A. Yes, if our organization is involved in a dispute and I am a member of the Joint Board, I would be allowed to present our side of the case to the National Joint Board along with a representative of the other disputing craft.

Q. What do you mean, in an oral argument type? A. In an oral argument, in oral argument. And after both [1234] sides have been heard and rebuttals have been heard, we then would be ordered out of the room while the other members of the Board vote.

Q. And if you have a case, do one of the alternates then sit in your place if you are a regular member? A. Yes, sir, they do.

Q. And I assume when you were an alternate you did the same thing, sat in for regular members whose unions had cases? A. That's right. An alternate has no vote. It's only the regular members that vote.

Q. I see. Does an alternate have a vote when he sits in for a regular member? A. Oh, yes, he moves up then.

Q. If a union who had a regular member on the Board had a dispute the regular member would not vote on it

but one of the labor alternates would take his place for that case— A. That's right.

Q. —is that what you are saying? A. Yes, sir.

Q. Now, you say you have just been made a regular member April 1st. A. Right.

Q. Is that membership permanent? A. No, it's not. They rotate the members.

Q. Among whom? [1235] A. Among the contractors side and the labor's side.

Q. You mean from different unions? A. Different unions.

Q. Now, other than the two alternates that you just mentioned as being on the labor side, are there any other alternates? A. Yes, there are, the president of the Building Trades Department submits a list of other international unions and names of representatives which have been given to him by the general president of that organization to be ready in the event an alternate or regular member didn't appear, and there wouldn't be a quorum for that date.

There is also on the contractors side the very same thing, a list of names of alternates who would take the place in the event the alternate or regular member of that group would be absent or out of the city or unable to attend for some reason.

Q. In other words, you mean if the regular members and the alternates, say, on the labor side, if both the regular member and alternate member couldn't be there one of these additional alternates would take his place? A. Yes, sir.

Q. Now, do you know whether there is any person in the B.M.P.I.U. who serves as one of these alternates? A. They have a representative, the B.M.P.I.U. has a representative serve from time to time.

[1236] Q. Who is that? A. Mr. Conners.

Q. What is his position? A. The secretary-treasurer.

Q. And do you know if he has in fact served on the Board as an alternate? A. Yes, he has.

* * * * * * * * * * *

[1237] Q. (By Mr. Capuano) Mr. Power, did your union submit a dispute to the National Joint Board in connection with the Anderson Library job at the University of Houston? A. Yes, sir, we did.

Q. Now, I am going to show you a group of exhibits, P-36-A through -U, and they go in chronological order with the oldest on the bottom. And I will ask you if you can just look at that set of exhibits and tell me what it is. Keep them in order, would you, please? A. It is the file from the National Joint Board.

Q. Is that the full Joint Board file? A. I would say so.

Q. On what case? A. On the University Science Building, Anderson Library.

[1238] Q. O.K.

Now, when did the Joint Board make its initial decision in this case? A. I believe it was, it's in the file here, but I believe it was on the 9th that they made the decision.

Q. 9th of what? A. November.

Q. '66? A. Yes, sir.

Q. It would probably be towards the bottom of the pile. A. I will check the date.

It was on the 9th of November, 1966, in a letter sent out dated November 10th.

Q. And that is P-36-F, is that right? A. Yes, sir.

Q. All right.

Now, after that decision did you have any correspondence or did your union have any correspondence with the Joint Board concerning compliance with the decision? A. Yes, we did.

Q. Let me ask you this first, in whose favor was the Joint Board's decision of November 10th? A. In favor of the Plasterers.

Q. All right.

And later did you have correspondence with the Joint Board [1239] concerning compliance? A. Yes, we did.

Q. And what was the reason for that? A. Well, there's a telegram in here in this file, but without even reading

it in essence it said they were complying with the decision rendered by the Joint Board.

Q. Who said that, who sent the telegram? A. McHargue, I think, is his name.

Q. Prior to McHargue's telegram did the O.P. have any correspondence with the Joint Board concerning compliance with the decision? A. Well, it was because of the telegram and complaints from our Local Union that they were not complying with the decision that we then wired the National Joint Board several times to tell them that they were not complying, to again direct the contractor and the local union to comply with the decision of record.

This wasn't done, and this brought about the results of we, then, because of the telegram sent by McHargue, asked for a clarification of the decision.

Q. All right.

Now, are the various telegrams that you sent to the Joint Board included within this file that you have in front of you? A. I believe they are.

Q. And is McHargue's telegram in there, too? [1240] A. I believe it is. Here is our telegram requesting the clarification.

Q. Which exhibit is that? A. Exhibit 36-Q.

Q. All right. A. Then here is our telegram stating that they are in compliance.

Q. They were in compliance? A. That they were not in compliance. We notified the Board that the telegram that they had received from Mr. McHague indicating the Tile Setters 20 contends they are not in compliance is in error and erroneous, and we asked the Board on the date indicated on the telegram that the Board direct the contractor and Tile Layers Local 20 to abide by the decision rendered on November 9 which was to the Plasterers.

Q. And you are reading from what exhibit number? A. P-36-O.

There is that telegram from McHargue (indicating).

Q. The telegram from McHargue you were referring to is what exhibit number? A. 36-L.

Q. P-36-L? A. P-36-L.

Q. All right.

Now, after you sent your telegram to the Joint Board [1241] requesting a clarification of the decision did you send a letter to the Joint Board as a follow-up to that telegram? A. Yes.

Q. Is the letter included in that file? A. Yes, here it is, and that is marked Exhibit 36-T.

Q. And what is the date of that letter? A. The date of that letter is March 13, 1967.

Q. All right.

And then do you know if after that letter was sent to the Joint Board the Joint Board considered its previous decision? A. Yes, it clarified it.

Q. Was that a meeting of the Joint Board? A. Yes, it was a meeting of the Joint Board.

Q. And then did the Joint Board—well, they did render a decision on March 15, right? A. That's right.

Q. And that is also in this file? A. Yes, sir, it is.

Q. And that is marked as— A. P-36-U.

Q. All right.

Now, do you know if the B. M. P. I. U. submitted any correspondence to the Joint Board in connection with this dispute on the Anderson Library? A. Yes, they did.

[1242] Q. Is that included in the field? A. Yes, it is, and it's marked 36-E.

Q. P-36-E? A. P-36-E.

Q. All right.

And when the Joint Board originally considered that dispute in November do you know if any representative of the B. M. P. I. U. appeared before the Board to argue their position? A. Yes, they did have a representative present to argue their position.

Q. Did the O. P. have a representative to argue their position? A. Yes, the O. P. did have a representative present to argue their position.

Q. Did you vote on that case in the original decision in November? A. I did not.

Q. Now, at the meeting in which the Joint Board clarified its decision, that is, the March 15 letter, P-36-U, do you know if the B. M. had a representative at the meeting of the Joint Board which resulted in that March 15 clarification? A. Yes, they did have a representative present.

Q. Did he argue the B. M.'s position? A. Yes, he did. [1243] Q. Did the O. P. have a representative present? A. Yes, they did.

Q. Did he argue their position? A. Yes, he did.

Q. Did you vote in that decision? A. Absolutely not.

Q. And I am speaking of the clarification there. A. Absolutely not.

Q. Now, did the March 15 clarification change or alter the original decisison of the Board or change the award to another craft? A. It did not.

Q. The award was still to the Plasterers? A. The award was still to the plasterers, clarifying its decision of November 9th.

Q. All right.

Now, was this file that you have in front of you obtained from the Joint Board, itself? A. Yes, it was.

Q. Could you tell me, are those files available, the Joint Board files? A. They are available to anybody, anyone affected with the dispute after the case is decided.

Q. All right.

Now, we talked about an appeals board earlier. Do you know [1244] if the B. M. P. I. U. filed an appeal with the Appeals Board from either the November, or let me ask this, did the B. M. file an appeal to the Appeals Board from the November 9th decision? A. They did not.

Q. Did they file an appeal to the Appeals Board from the March 15 decision? A. They did not.

Q. Or clarification, I should say.

And are there time limits in which you must file an appeal? A. Yes, there is.

Q. What is the time limit? A. Ten days.

Q. After the decision? A. Right.

Q. So the time has elapsed on both, then? A. That's right. I might point out, when I file for an appeal the contractor who has made the assignment keeps his assignment in effect.

Q. He would keep his regular assignment in effect? A. Keeps his assignment in effect pending the decisison of the Appeals Board. If they accept the appeal the assignment continues as is even though the Appeals Board had awarded the work to the Plasterers.

Q. Do you know if the B. M. asked the Joint Board for [1245] reconsideration of either of its two— A. They did not.

Q. O.K.

I am speaking of either the November 10th decision or March 15 clarification. A. They did not.

* * * * * * * * * *

[1255] Q. Now, do you know of any place in the rules or in the green book that gives the Board the right or the power to make that contractual agreement between the parties? A. Well, the Board interprets these agreements, and they have to do it in light of the changes that go into a building today. I might give you an example. For example, say water was running through a plastic pipe instead of a galvanized or copper pipe. Would they say or anybody else say that this wouldn't be the plumber that would put that pipe in? Would some other organization then come up and state that "I am going to claim it because it's not pipe"?

* * * * * * * * * *

[1256] Q. You are not aware of any, then, that gives them the power to add to or delete from a contract between two unions? A. I don't know where it would be in the green book or rules or regulations. All I can say is what I said to you a few minutes ago, that the Board has to interpret agreements in light of the technological changes that exist today in the building and construction industry.

* * * * * * * * * *

[1261] Q. But now I am not asking you whether they will or not. I am asking you what the Board says the responsibility of the plasterer is. The Board has deleted that word which we contractually agreed on, is that right? A. Yes, ma'am.

Q. All right. A. But you also have to remember that this is a function that is set out in this agreement, what the plasterers will do.

Q. In the green book, you are referring to? A. Right. Scratching is a function. Plumbing is a function.

Q. Yes. A. Rodding is a function.

Q. Right. A. Squaring is a function.

Q. That's right. A. And the tile setter on his end of it will set his final setting bed.

Q. That's right.

Didn't you say scratching was a function, as well? Didn't ~~you~~ name it, four of them, again? A. I will repeat it for you. I said one of the functions [1262] was scratching.

Q. I though you did. All right. A. Another function is plumbing. Another one is rodding. And another one is squaring the walls.

Q. All right.

Now, then we are in agreement, you and I, that there has been added to the contractual agreement between the parties by the Board in telling the tile setter when he is to put his tile on? Are you and I in agreement on that? That has been an addition to the agreement. A. The Joint Board's decision is very clear.

Q. Now, Mr. Power—

Mr. Capuano: I think he was starting to answer, if you will let him go.

Q. (By Miss Thacker) —answer my question. A. Again, the Joint Board decision was very clear. It stated the work in dispute is covered by the agreement of record of August 22, 1917 and shall be assigned to plasterers except that any coat to be applied wet the same day under the tile shall be placed by the tile setters.

Q. Now, are we in agreement that the time the tile setter is to put his tile on is not contained in the 1917 agreement? A. No, it's not contained in the 1917 agreement.

Q. All right.

And you and I are in agreement that these are additions [1263] in the Board's decision of November '66 and March '67, you agree with me on it? A. That these functions of plumbing, rodding and scratching—

Q. No, I am on the tile setter's part now, that when he can set his tile has been introduced to us in these two decision letters is an addition from the contract between your union and ours? A. I personally don't believe so.

Q. Well, now, show me, then, in the 1917 agreement where— A. This is getting to be a matter of semantics. It's what interpretation you are placing on it.

Q. No. A. The agreement is very clear. It sets out the functions of both organizations of what to do, and as I said before, that I am sure that any agreement in any organization in this green book, that the members on the Board would have to consider the changes in the building construction and determine where it's affected and where it's not.

* * * * * * * * * *

[1266] * * In this method back here he had his setting bed and his float coat. Could he put his tile on that? A. On his setting bed?

Q. Directly, with nothing? A. He could if he wanted to.

Q. He used a neat cement, didn't he, a dope coat, didn't he? A. He did.

Q. All right.

[1267] He is doing the same thing today, isn't he, except there are a few more things on the market that he might use, but he still may use a dope coat, a neat cement, a mastic, an adhesive, a dry-set, to have his tile adhere to his setting bed? A. His setting bed is the Tec, the L.&M. or dry-set materials that you are talking about.

Q. In your opinion?

Mr. Capuano: Well, he is the man on the stand.

Q. (By Miss Thacker). Is that right, Mr. Power? A. Yes, ma'am.

Q. In your opinion you are saying that it is. A. Yes, ma'am. You can take this wall right alongside me here, and give me a piece of tile and I will take the tile, go over to that wall, put it up to it. It will fall right to the floor. In order for you to set your tile you have got to put on this thin-set material and that is what sets your tile to the wall.

* * * * * * * * * *

[1319] L. D. McHARGUE

recalled as a witness by and on behalf of the Tile Setters, having been previously sworn, was examined and testified further as follows:

* * * * * * * * * *

Direct Examination

Q. (By Miss Thacker) Now, you have heard the testimony given. Can you recall any particular job that has been stated as being a thin-set method that you know is not? [1320] A. Yes, I believe yesterday Mr. Saylors made the statement that they browned out the T.S.U. Library addition for the thin-set method, and I know for a fact that we or I, myself, floated these walls and put them up in a conventional manner.

* * * * * * * * * *

[1321] VICTOR ZAMBON

was called as a witness by and on behalf of the Tile Setters and, having been first duly sworn, was examined and testified as follows:

* * * * * * * * * *

Direct Examination

Q. (By Miss Thacker) Mr. Zambon, did you hear testimony given by the Respondent stating that it was a thinset on the Humble garage? A. It was float coat on the Humble garage.

Q. Did the Texas State Tile & Terrazzo do this job? A. Yes, ma'am.

* * * * * * * * * * *

EXHIBITS

Plasterers' Exhibit No. 3

NATIONAL JOINT BOARD FOR SETTLEMENT OF JURISDICTIONAL DISPUTES BUILDING AND CONSTRUCTION INDUSTRY
815 Sixteenth, Street, N. W., Washington, D. C. 20006
STerling 3-6817

November 10, 1966

In Reply Refer to: TEXAS 11/9/66

EDWARD J. LEONARD, General President
Operative Plasterers' and Cement
Masons International Association
1125 Seventeenth Street N W
Washington, D C 20036

THOMAS MURPHY, General President
Bricklayers Masons and Plasterers
International Union
Bowen Building
Washington, D C

SOUTHWESTERN CONSTRUCTION COMPANY
Contractor
P O Box 1204
Houston, Texas 77001

TEXAS STATE TILE AND TERRAZZO COMPANY
Subcontractor
3115 Golfcrest
Houston, Texas

Gentlemen:

At its meeting November 9, 1966, the Joint Board considered the jurisdictional dispute between the Operative Plasterers' and Cement Masons International Association

and the Bricklayers Masons and Plasterers International Union over the plumbing, rodding and squaring of walls which are to receive tile, Houston University Science Building, Houston Texas, Southwestern Construction Company contractor, Texas State Tile and Terrazzo Company subcontractor.

The Joint Board voted to make the following job decision: The work in dispute is governed by the agreement of August 22, 1917, and shall be assigned to plasterers, except that any coat to be applied wet the same day under tile shall be placed by tile setters. In the thin-set or adhesive method of applying tile to walls and ceilings, the plasterer shall apply the first and second coats of mortar that is the scratch coat and plumb coat. The plasterers shall plumb, rod, and square all walls, rod and level all ceilings and the tile setter shall apply the final setting bed for his tile.

This action of the Joint Board was predicated upon particular facts and evidence before it regarding this dispute and shall be effective on this particular job only.

Very truly yours,

WILLIAM J. COUR
William J. Cour
Chairman

WJC/lma

cc: C J HAGGERTY—B&CT DEPT
DALE WITCRAFT—AGC

* * * * * * * * * * *

Plasterers' Exhibit No. 9

GENERAL CONTRACT SPECIFICATIONS

Job—No. 1292

Additions To The
M. D. ANDERSON
LIBRARY

University of Houston
Houston, Texas

January 27, 1965

DIVISION NO. 14

Furring, Lathing And Plastering

14-6 Workmanship

(a) All work shall be executed by skilled workmen in such a manner as to fulfill the requirements of the Drawings and these Specifications.

14-11 Temperature and Ventilation (ASA)

(a) In cold weather, a uniform temperature of not less than 55°F and not more than 80°F shall be continuously maintained in the building for a week before the application of plaster, continuing during plastering operations and after the plaster is dry. The heat shall be well distributed in all areas, and deflective or protective screens shall be used to prevent concentrated or uneven heat on plaster areas near the heat source. Where required, heat shall be furnished by the General Contractor.

14-19 Guarantee

(a) This Contractor shall, as a part of his Contract, furnish a written guarantee warranting all work executed under this Division against popping, checking, discoloring, falling off or becoming otherwise defective for a period of

one (1) year from and after completion and acceptance of the work as evidenced by date of final payment and binding himself to repair or replace, without additional compensation beyond the contract amount, any defect which may develop within that period, when ordered to do so by either Owner or Architect.

DIVISION NO. 15

Precast Terrazzo & Tile Work And Marble Work

15-1 General Conditions

(a) The current edition of "The General Conditions of the Contract" as published by The American Institute of Architects together with the Supplemental General Conditions, Pages 1-1 to 1-16 as specified under Division 1 of these Specifications, shall be considered as a part of this Division of the Specification, insofar as they may be termed applicable, whether attached hereto or not.

(b) Should the General Contractor desire to sublet the work included under this Division of the Specifications and also include in this Subcontract additional items of work that are specified under other Divisions of the Specifications, it shall be the responsibility of the General Contractor to adequately designate these additional items of work to the Sub-Bidders at the time that he requests proposals from them.

15-2 Scope

(a) The work under this Division of the Specifications shall include all labor, materials, equipment and appurtenant accessories necessary for, or incidental to, the completion of all ceramic tile work as indicated or reasonably implied by the Drawings and as specified herein. Precast terrazzo and marble work shall also be included in this Division.

15-3 Samples

(a) Contractor must furnish samples for the Architect's approval before purchasing any material.

15-4 Preparatory Work

(a) This Contractor shall, as a part of this Contract, examine all preparatory work and report to the Architect or General Contractor any defects or imperfections which, in his opinion, would prevent the satisfactory completion or permanency of his work. Failure to make such an inspection and report will be construed as an acceptance of preparatory work and later defects will not relieve this Contractor of his responsibility under the Guarantee.

15-5 Materials

(a) Floor tile shall be 1-9/16" x 1-9/16" unglazed ceramic floor tile in colors selected by the Architect.

(b) Toilet wall tile to be 4¼" x 4¼" dull mat square edge Hermosa with cove base. Salient angles to be bull-nosed, interior angles coved.

(c) Setting bed shall be composed of mortar made from one (1) part Portland cement and three (3) parts sand with two (2) pounds of Master Builder's "Stearox 100" added to each sack of cement in accordance with the directions of the manufacturer.

(d) Tile for stairs to be 6" x 6" x ½" Quarry tile as manufactured by the Carlyle Tile Company.

(e) Tile for window stools to be the same as above except one edge (nosing) of tiles to be finished and have small Champer on bottom corner as shown on the Contract Drawings.

15-6 Laying Tile

(a) The mortar shall be spread until the surface of the mortar setting bed is in true even planes. Set temporary screed clips as guides to assure these results. Only as large an area as can be covered with tile before the mor-

tar has reached its initial set shall be placed in one operation.

(b) All tiles must be firmly secured in place, joints must be well filled, and lines must be kept straight and true, and all finish surfaces brought to true level planes. The completed work must be free from chipped edges.

(c) As soon as mortar setting bed has sufficiently hardened, floor tile shall be grouted with Portland Cement colored to match tile. The grout must be forced into the joints. Sprinkle with dry cement and finish flush and true. All surplus grouting shall be removed and the face of the tile left clean.

(d) Upon completion of the work, the tile Contractor shall remove all unused materials, rubbish, etc., in connection with his contract and shall give the tile a thorough cleaning.

15-11 Guarantee

(a) The undertaking of this Subcontract constitutes the issuance of a guarantee to replace any defective workmanship or material that may occur during a period of one (1) year from date of final payment.

* * * * * * * * * *

Plasterers' Exhibit 35

Organized February 10, 1908

CONSTITUTION OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT AFL-CIO 1966

Amended December, 1965

* * * * * * * * * * *

ARTICLE II

Objects and Principles

The objects and principles of this body are:

* * * * * * * * * * *

6. To secure the adjustment of trade and jurisdictional disputes in the building and construction trades industry along practical lines as they may arise from time to time; and such decisions to be final and binding on all affiliated National and International Unions and their affiliated Local Unions.

* * * * * * * * * * *

12. To protect National or International Unions affiliated with the Department in their established trade jurisdiction in the building and construction trades industry as historically granted and conferred upon them by the American Federation of Labor and as traditionally exercised by them.

* * * * * * * * * * *

ARTICLE X

Jurisdictional Disputes

All jurisdictional disputes between or among affiliated National and International Unions and their affiliated Local Unions and employers shall be settled and adjusted according to the present plan established by the Building and Construction Trades Department, or any other plan or method of procedure adopted in the future by the De-

partment for the settlement of jurisdictional disputes. Said present plan or any other plan adopted in the future shall be recognized as final and binding upon the Department and upon all affiliated National or International Unions and their affiliated Local Unions.

P-36A

Plasterers' Exhibit 36

OPERATIVES PLASTERERS' AND CEMENT MASONS'
International Association of the United States and Canada

October 27, 1966

Mr. William J. Cour, Chairman
National Joint Board for Settlement of
Jurisdictional Disputes
815 - 16th Street, N.W.
Washington, D.C. 20006

Re: Dispute between our members and the B.M. & P.I.U. (Tile Setters) over the plumbing, rodding and squaring of walls which are to receive tile on the Houston University Science Building, Cullen Boulevard, Houston, Texas. Southwestern Construction Company, P. O. Box 1204, Houston, Texas 77001, General Contractor, Texas State Tile and Terrazzo Company, 3115 Golfcrest, Houston, Texas, Subcontractor.

Dear Mr. Cour:

Effiorts to resolve the above-mentioned dispute have failed; therefore, it necessitates the submission of this case to the National Joint Board for Settlement of Jurisdictional Disputes. The work in dispute has historically been performed by Plasterers and the Joint Board has rendered many, many decisions to this effect.

The work in dispute is covered by an Agreement of Record which appears on pages 32 and 33 of the Green Book and

is further covered by a Decision of Record which appears on page 104 of the Green Book. We, therefore, respectfully request that the National Joint Board once again rule that the work in dispute rightfully comes under the jurisdiction of the Plasterer members of this International Association.

Very truly yours,

EDWARD J. LEONARD
Edward J. Leonard
General President

EJL
lah
P-36B

October 28, 1966

TEXAS 10/28/66

Southwestern Construction Company
Contractor
P O Box 1204
Houston, Texas 77001

Texas State Tile and Terrazzo Company
Subcontractor
3115 Golfcrest
Houston, Texas

Gentlemen:

This office has been advised of a jurisdictional dispute between the Operative Plasterers and Cement Masons International Association and the Bricklayers Masons and Plasterers International Union over the plumbing, rodding and squaring of walls which are to receive tile, Houston University, Science Building, Cullen Boulevard, Houston, Texas, Southwestern Construction Company contractor, Texas State Tile and Terrazzo Company subcontractor.

Please send a full and complete description of the work in dispute, including if possible pictures or prints, to this office by November 4, 1966.

Very truly yours,

WILLIAM J COUR
Chairman

WJC/lma
cc: Dale Witcraft—AGC
P-36C

October 28, 1966

TEXAS 10/28/66

Thomas Murphy, General President
Bricklayers Masons and Plasterers
International Union
Bowen Building
Washington, D.C.

Dear Mr. Murphy:

President Leonard has requested a job decision in a jurisdictional dispute between the Operative Plasterers and Cement Masons International Association and the Bricklayers Masons and Plasterers International Union over the plumbing, rodding and squaring of walls which are to receive tile, Houston University Science Building, Cullen Boulevard, Houston, Texas, Southwestern Construction Company contractor, Texas State Tile and Terrazzo Company subcontractor.

May I have your position with regard to the work in dispute by November 4, 1966.

Very truly yours,

WILLIAM J COUR
Chairman

WJC/lma

cc: E J Leonard—Cement Masons

P-36D

TELEGRAM

SHA112 (57) NSA156 DD140
D HSC212 PD HOUSTON TEX 1 1200P CST
NATIONAL JOINT BOARD FOR SETTLEMENT OF JURISDICTIONAL DISPUTES BLDG AND CONSTRUCTION INDUSTRY ATTN WILLIAM J COUR 815 16 ST NORTHWEST PHONE ST 36817 WASHDC
RE HOUSTON UNIVERSITY SCIENCE BUILDING YOUR LETTER OCTOBER 28 1966 TO SOUTHWESTERN CONSTRUCTION CO AND TEXAS STATE TILE AND TERRAZZO INC BE ADVISED WE ARE NOT STIPULATED WITH THE NATIONAL JOINT BOARD FOR SETTLEMENT OF JURISDICTIONAL DISPUTES BUILDING AND CONSTRUCTION INDUSTRY WE DESIRE TO MAKE THIS WORK ASSIGNMENT DISPUTE UNDER SECTION 10(K) OF TAFT ACT BEFORE THE NATIONAL LABOR RELATIONS BOARD
G ZAMBON TEXAS STATE TILE AND TERRAZZO INC 28 1966 10(K)
(16).

P-36E

BRICKLAYERS, MASONS AND PLASTERERS
INTERNATIONAL UNION OF AMERICA

1 November 1966

Mr. William J. Cour, Chairman
National Joint Board for Settlement
of Jurisdictional Disputes
815 Sixteenth Street, N.W.
Washington, D.C. 20006

Dear Mr. Cour:

This is in reply to your letter of October 28 (TEXAS 10/28/66) advising President Leonard has requested a job decision in the jurisdictional dispute between the Plas-

terers and the Bricklayers over the plumbing, rodding and squaring of walls which are to receive tile at the Houston University Science Building, Cullen Boulevard, Houston, Texas. Southwestern Construction Company, contractor; Texas State Tile and Terrazzo Company, subcontractor.

We have given our position in this matter in dozens of pieces of correspondence, and there has never been a change in our position that the tilelayer should be accorded the right to prepare the walls for the setting of tile. This would include the application of the float coat which is a part of the so-called setting bed.

The agreement of August 22, 1917, relates to the preparation of walls, and at that time there was only one known method for the installation of tile, which was the conventional application of a coat that was to be scratched by the plasterer to guarantee adhesion of the final coat which was to be put on by the tilelayer to act as a bed for the tile.

We, once again, respectfully request the Joint Board render job decisions in accordance with the 1917 agreement, using the same language which specifically guarantees the tilelayer the right to apply the setting bed.

Yours very truly,

GEORGE KING
George King
First Vice President

GK:rd

P-36F

November 10, 1966

TEXAS 11/9/66

Edward J Leonard, General President
Operative Plasterers' and Cement
Masons International Association
1125 Seventeenth Street N W
Washington, D C 20036

Thomas Murphy, General President
Bricklayers Masons and Plasterers
International Union
Bowen Building
Washington, D C

Southwestern Construction Company
Contractor
P O Box 1204
Houston, Texas 77001

Texas State Tile and Terrazzo Company
Subcontractor
3115 Golfcrest
Houston, Texas

Gentlemen:

At its meeting November 9, 1966, the Joint Board considered the jurisdictional dispute between the Operative Plasterers' and Cement Masons International Association and the Bricklayers Masons and Plasterers International Union over the plumbing, rodding and squaring of walls which are to receive tile, Houston University Science Building, Houston, Texas, Southwestern Construction Company contractor, Texas State Tile and Terrazzo Company subcontractor.

The Joint Board voted to make the following job decision: The work in dispute is governed by the agreement of August 22, 1917, and shall be assigned to plasterers, except that any coat to be applied wet the same day under tile shall be placed by tile setters. In the thin-set or adhe-

sive method of applying tile to walls and ceilings, the plasterer shall apply the first and second coats of mortar that is the scratch coat and plumb coat. The plasterers shall plumb, rod, and square all walls, rod and level all ceilings and the tile setter shall apply the final setting bed for his tile.

This action of the Joint Board was predicated upon particular facts and evidence before it regarding this dispute and shall be effective on this particular job only.

Very truly yours,

WILLIAM J COUR
Chairman

WJC/lma
cc: C J Haggerty—B&CT Dept
Dale Witcraft—AGC

P-36G

TELEGRAM

LLG 012 (47) NSA004
SSJ680 NS HSA101 NL PD HOUSTON TEX 24
NATIONAL JOINT BOARD FOR SETTLEMENT OF JURISDICTIONAL DISPUTES BUILDING AND CONSTN INDUSTRIES 815 16 ST NW FONE ST36817
ATTN WILLIAM J COUR WASHDC
REFERENCE OUR WIRE NOV FIRST 1966 JOB REFERENCE ERRONEOUS WIRE SHOULD HAVE READ QUOTE REFERENCE M D ANDERSO LIBRARY UNIVERSITY OF HOUSTON YOUR LETTER OCT 28, 1966 TO SOUTHWESTERN CONSTRUCTION COMPANY IN TEXAS STATE TILE AND TERRAZZO INC BE ADVISED WE ARE NOT STIPULATED WITH THE NATIONAL JOINT BOARD FOR SETTLEMENT OF JURISDICTIONAL DISPUTES BUILDING AND CONSTRUCTION INDUSTRY WE DESIRE TO MAKE THIS WORK ASSIGNMENT DISPUTE UNDER SECTION 10(K of TAFT ACT BEFORE THE NATIONAL

RELATIONS LABOR BOARD TEXAS STATE TILE AND TERRAZZO INC 3115 GULFCREST BLVD HOUSTON.

P-36H

TELEGRAM

SHA033(09) CTA 264
WG094 WW RBA086 DL PD EX FAX RB WASHINGTON DC 26 1156A
EST
WM J COUR, CHAIRMAN, NATIONAL JOINT BOARD FOR SETTLEMENT OF JURISDICTIONAL DISPUTES
815 16TH ST NORTHWEST WASHDC
RE TEXAS 11/9/66—AT ITS MEETING NOVEMBER 9, 1966 THE JOINT BOARD CONSIDERED DISPUTE BETWEEN PLASTERERS AND BRICKLAYERS OVER PLUMBING; RODDING AND SQUARING OF WALLS WHICH ARE TO RECEIVE TILE ON HOUSTON UNIVERSITY SCIENCE BUILDING, CULLEN BOULEVARD, HOUSTON, TEXAS, SOUTHWESTERN CONSTRUCTION COMPANY CONTRACTOR, TEXAS STATE TILE AND TERRAZZO COMPANY, SUBCONTRACTOR. THE JOINT BOARD VOTED THAT THE WORK IN DISPUTE WAS THE WORK OF THE PLASTERERS. CONTRACTOR AND TILE SETTERS REFUSE TO ABIDE BY THE DECISION. WE THEREFORE RESPECTFULLY REQUEST THAT YOU DIRECT THE CONTRACTOR AND THE B M & P I U TO ABIDE BY THE DECISION RENDERED BY THE NATIONAL JOINT BOARD ON NOVEMBER 9, 1966

TELEGRAM
[continued]

EDWARD J LEONARD GENERAL PRESIDENT, OP& CMIA
11/9/66 9 1966 9 1966
P&CMIA
(20).

P-36I

January 27, 1967

TEXAS 11/9/67

Thomas Murphy, General President
Bricklayers, Masons and Plasterers
International Union
Bowen Building
Washington, D C

Southwestern Construction Company
Contractor
P O Box 1204
Houston, Texas 77001

Texas State Tile and Terrazzo Company
Subcontractor
3115 Golfcrest
Houston, Texas

Gentlemen:

With further to our file Texas 11/9/66, the following telegram has been received from President Leonard:

> "Re Texas 11/9/66—At its meeting November 9, 1966 the Joint Board considered dispute between Plasterers and Bricklayers over plumbing, rodding and squaring of walls which are to receive tile on Houston University Science Building, Cullen Boulevard, Houston, Texas, Southwestern Construction Company contractor, Texas State Tile and Terrazzo Company subcontractor. The Joint Board voted that the work in dispute was the work of the Plasterers. Contractor and Tile Setters refuse to abide by the decision. We therefore respectfully request that you direct the contractor and the B M & P I U to abide by the decision rendered by the National Joint Board on November 9, 1966."

Contractor is directed to comply with the Joint Board job decision of November 9, 1966.

President Moreschi is requested to instruct the local union to comply with this Joint Board job decision.

Very truly yours,

WILLIAM J COUR
Chairman

WJC/lma

cc: E J Leonard—Tile Setters
D R Witcraft—AGC

P-36L

TELEGRAM

SHA028 (46) BB040
NSA080 NS HSD029 D HOUSTON TEX 2 854ACST
WILLIAM J COUR CHAIRMAN
NATIONAL JOINT BOARD 815 16TH ST NORTH-WEST WASHDC
REGARDING TEXAS 11-9-67 TILE LAYERS LOCAL 20 CONTENDS WE ARE IN COMPLIANCE WITH RULING WHICH STATED THE FINAL FLOAT COAT WOULD BE WORK OF THE TILE LAYERS AND THIS IS ALL WE ARE DOING. THANK YOU VERY MUCH
L D MCHARGUE SECRETARY
11-9-67 20

(18)

P-36O

TELEGRAM

SHA071 (56) CTA347
WF299 WW RBB031 DL PD FAX RB WASHINGTON DC 9 1105A EST
WM J COUR, CHMN NATL JOINT BOARD FOR SETTLEMENT OF JURISDICTIONAL DISPUTES
815 16TH ST NW WASHDC
RE TEXAS 11/9/66 ON FEBRUARY 2, 1967 YOU SENT US A LETTER QUOTING A TELEGRAM YOU HAD

RECEIVED FROM L D MCHARGUE WHO INDICATES THAT TILE LAYERS' LOCAL 20 CONTENDS THAT THEY ARE IN COMPLIANCE WITH THE DECISION RENDERED BY THE JOINT BOARD ON NOVEMBER 9, 1966 WHICH AWARDED THE PLUMBING, RODDING AND SQUARING OF WALLS WHICH ARE TO RECEIVE TILE ON THE HOUSTON UNIVERSITY SCIENCE BUILDING, HOUSTON TEXAS, TO THE PLASTERERS. THE CONTENTS OF THE TELEGRAM RECEIVED FROM SECRETARY MCHARGUE ARE ERRONEOUS. AS OF THIS DATE WE WISH TO ADVISE YOU THAT THE CONTACTOR AND TILE LAYERS LOCAL 20 ARE NOT ABIDING BY THE DECISION RENDERED ON NOVEMBER 9, 1966

TELEGRAM
[continued]

WE RESPECTFULLY REQUEST THAT SOUTHWESTERN CONSTRUCTION COMPANY CONTRACTOR, PO BOX 1204, HOUSTON TEXAS 77001, Texas State Tile and .Terrazzo Company Subcontractor, 3115 Golfcrest, HOUSTON TEXAS AND TILE LAYERS LOCAL 20 BE DIRECTED TO IMMEDIATELY COMPLY WITH THE DECISION RENDERED NOVEMBER 9, 1966
EDWARD J LEONARD GENERAL PRESIDENT OP& CMIA

(20).

P-36P

P-36P

February 10, 1967

TEXAS 11/966

Thomas Murphy General President
Bricklayers, Masons and Plasterers
International Union
Bowen Building
Washington D C

Southwestern Construction Company
Contractor
P O Box 1204
Houston Texas 77001

Texas State Tile and Terrazzo Company
Subcontractor
3115 Golfcrest
Houston Texas

Gentlemen:

With further reference to our file Texas 11/966, the following telegram has been received from President Leonard:

"Re Texas 11/966 on February 2, 1967 you sent us a letter quoting a telegram you had received from L D McHargue who indicates that tile layers' local 20 contends that they are in compliance with the decision rendered by the Joint Board on November 9, 1966 which awarded the plumbing, rodding and squaring of walls which are to receive tile on the Houston University Science Building, Houston Texas, to the plasterers. The contents of the telegram received from Secretary McHargue are erroneous. As of this date we wish to advise you that the contractor and tile layers local 20 are not abiding by the decision rendered on November 9, 1966. We respectfully request that Southwestern Construction Co. contractor, Texas State Tile & Terrazzo Co. subcontractor, and tile lay-

ers local 20 be directed to immediately comply with the decision rendered November 9, 1966."

Contractor is again directed to comply with the Joint Board job decision of November 9, 1966.

President Murphy is again requested to instruct the local union to comply with this Joint Board job decision.

Very truly yours,

WILLIAM J COUR
Chairman

WJC/mjk
cc: E Leonard—OPCMIA
D Witcraft—AGC

P-36Q

WESTERN UNION

SENDING BLANK

Call letters GDS Paid Charge to OP&CMIA March 6, 1967

William J Cour, Chairman, National Joint Board of Settlement of Jurisdictional Disputes

815 16th Street, Northwest Washington D C

With reference to File TEXAS 11/9/66, would appreciate the Joint Board clarifying its decision of November 9, 1966 regarding dispute between our members and the Bricklayers over plumbing, rodding and squaring of walls which are to receive tile on the Houston University Science Building, Houston Texas, Southwestern Construction Company Contractor, Texas State Tile and Terrazzo Company Subcontractor. Additional information regarding our request for clarification of this decision to follow.
Edward J Leonard, General President, O P & C M I A
EJL

P-36R

FCL NL NATL JOINT BOARD MAR 6, 1967

BOOK TWO COPIES

SOUTHWESTERN CONSTRUCTION CO—CONTRACTOR
2929 RUSK AVENUE
HOUSTON TEXAS

TEXAS STATE TILE AND TERRAZZO COMPANY
SUBCONTRACTOR
3115 GOLFCREST
HOUSTON TEXAS

PRESIDENT LEONARD HAS REQUESTED CLARIFICATION OF JOINT BOARD JOB DECISION OF NOVEMBER 9, 1966 IN JURISDICTIONAL DISPUTE BETWEEN PLASTERERS AND BRICKLAYERS OVER PLUMBING, RODDING AND SQUARING OF WALLS WHICH ARE TO RECEIVE TILE, HOUSTON UNIVERSITY SCIENCE BUILDING JOB, HOUSTON TEXAS, SOUTHWESTERN CONSTRUCTION CO CONTRACTOR, TEXAS STATE, TILE AND TERRAZZO COMPANY SUBCONTRACTOR. THIS REQUEST FOR CLARIFICATION WILL BE CONSIDERED BY JOINT BOARD AT ITS MEETING MARCH 14, 1967.

WILLIAM J COUR CHAIRMAN NATIONAL JOINT BOARD
EIGHT FIFTEEN SIXTEENTH NORTHWEST

WCJ/lp

cc: E J LEONARD—OPCMIA
D R WITCRAFT—AGC

P-36S

NATL JOINT BOARD MAR 6, 1967

THOMAS F MURPHY GENERAL PRESIDENT
BRICKLAYERS MASONS AND PLASTERERS INTERNATIONAL UNION
BOWEN BUILDING
WASHINGTON.D C

PRESIDENT LEONARD HAS REQUESTED CLARIFICATION OF JOINT BOARD JOB DECISION OF NOVEMBER 9, 1966 IN JURISDICTIONAL DISPUTE BETWEEN OPCMIA AND BMPIU OVER PLUMBING, RODDING AND SQUARING OF WALLS WHICH ARE TO RECEIVE TILE, HOUSTON UNIVERSITY SCIENCE BUILDING JOB, HOUSTON TEXAS, SOUTHWESTERN CONSTRUCTION COMPANY CONTRACTOR, TEXAS STATE TILE AND TERRAZZO COMPANY SUBCONTRACTOR.
THIS REQUEST FOR CLARIFICATION WILL BE CONSIDERED BY THE JOINT BOARD AT ITS MEETING OF MARCH 14, 1967.
WILLIAM J COUR CHAIRMAN NATIONAL JOINT BOARD

WJC/lp

cc: E J LEONARD—OPERATIVE PLASTERERS & CEMENT MASONS INTERNATIONAL ASSOCIATION

P-36T

OPERATIVE PLASTERERS'
AND CEMENT MASONS'
International Association of the United States and Canada

March 13, 1967

Mr. William J. Cour, Chairman
National Joint Board for Settlement of
Jurisdictional Disputes
815 16th Street, N. W.
Washington, D. C. 20006

Re: TEXAS 11-9-66

Operative Plasterers' and Cement Masons'
International Association

Bricklayers, Masons and Plasterers' International
Union of America

Southwestern Construction Company
Texas State Tile and Terrazzo Company

Dear Mr. Cour:

Supplementing our telegram to you of March 6, 1967 requesting a clarification of the above captioned award, we submit the following information for consideration by the National Joint Board:

The OP & CMIA, on October 27, 1966, requested the National Joint Board to decide the jurisdictional dispute between the OP & CMIA and the Tile Setter members of the BM & PIU "over the plumbing, rodding and squaring of walls which are to receive tile on the Houston University Science Building" job. The Joint Board, on November 9, considered this dispute and the method in which walls were being prepared to receive tile and the installation of the tile and issued the following decision:

> The Joint Board voted to make the following job decision: The work in dispute is governed by the agreement of August 22, 1917, and shall be assigned to plasterers, except that any coat to be applied wet

> the same day under tile shall be placed by tile setters. In the thin-set or adhesive method of applying tile to walls and ceilings, the plasterer shall apply the first and second coats of mortar; that is the scratch coat and plumb coat. The plasterers shall plumb, rod and square all walls, rod and level all ceiling and the tile setter shall apply the final setting bed for his tile.

There is no dispute over the first part of the award dealing with installation of tile applied wet the same day under tile, although under the 1917 Agreement and Decision of Record, which appear in the Green Book, the application of this coat would also be the work of the Plasterers. However, in the interest of efficiency, the Plasterers will abide by that portion of the Board's award. Clarification, however, is needed of that portion of the award concerning the "thin-set or adhesive" method of applying tile in view of the position taken by the B.M. & P.I.U. here. On this job, the Tile Setters refused to relinquish the application of the second coat of mortar on metal lath and the first coat of mortar on concrete block or clay tile to the Plasterers in accordance with the Joint Board's decision, despite the fact that these coats were being used to plumb, rod and square the walls preparatory to receiving tile to be installed in the thin-set or adhesive method; that is, the second coat of mortar on metal lath or the first coat of mortar on concrete block or clay tile was allowed to dry and the tile installed later by the use of a commercial Portland cement based mortar or mastic.

In view of the B.M. & P.I.U.'s refusal to abide by the award, we requested by telegram that the contractor and the B.M. & P.I.U. be directed to abide by the November 9 decision. On January 27, the contractors involved and the B.M. & P.I.U. were ordered by the Joint Board to comply with the decision of November 9.

On February 2, 1967, the O.P. & C.M.I.A. was informed by the Chairman of the Joint Board that Tile Layers Local

20 of the B.M. & P.I.U had forwarded the following telegram to the Joint Board:

> "Regarding Texas 11-9-66 Tile Layers Local 20 contends we are in compliance with ruling, which stated the final float coat would be work of the Tile Layers and this is all we are doing. Thank you very much.
>
> L. D. McHargue, Secretary"

In other words, the Tile Setters are interpreting the last part of the Joint Board's award which says "the tile setter shall apply the final setting bed for his tile" to mean that they have been awarded the second coat of mortar on metal lath or the first coat of mortar on concrete block or clay tile even though it was only these coats of mortar which are in dispute and which the Joint Board awarded to the Plasterers since these coats are used to plumb, rod and square the walls. The Tile Setters in their telegram refer to the plumb coat as the "float coat" and infer that this coat is part of the setting bed. This distorted interpretation of the Joint Board's award has been utilized by the Tile Setters in many cases to excuse their refusal to comply with the awards of this Board and, therefore, it is time that this matter be clarified once and for all so there is no room for distortion.

The Tile Setters claim that the Plasterers are only entitled to the first or scratch coat of mortar on metal lath when tile is to be set in the thin-set or adhesive method, and are entitled to no work when tile is to be installed in a thin-set or adhesive method on concrete block or other firm foundation, even though in both cases a coat of mortar is to be installed to plumb, rod and square the walls prior to the installation of the tile. The Tile Setters argue that this plumb coat is their setting bed, which, under the Joint Board's award, they are entitled to do. It is quite clear, however, that this plumb coat is the work that has been consistently awarded to the Plasterers in this case and all prior Joint Board decisions.

In view of the position taken by the Tile Setters in this case, it is necessary that the Joint Board clarify its decision of November 9 to specifically define the term "final setting bed" in the thin-set or adhesive method of installing tile.

It is quite clear that the setting bed in the thin-set or adhesive method is the commercial Portland cement based mixtures such as TEC, L&M, etc., or the mastic type mixtures which are used to apply the tile over a previously prepared coat of mortar which is *dry*. The dry plumb coat of mortar cannot be called a setting bed—its purpose is not to bed tile to the wall but rather to make the wall plumb and square. After the plumb coat of mortar is applied, the Tile Setter may apply either a third coat of mortar over the dry plumb coat and bed his tile in it while still wet (the conventional method), or apply a thin coat of TEC or other commercially prepared thin setting material and set his tile in it (the thin-set method). In other words, the thin setting bed materials are substitutes for the Tile Setters' conventional mortar setting bed.

A suggested method of clarification may be to change the last sentence of Texas 11-9-66 to read:

> "In the thin-set adhesive method of applying tile to walls and ceilings, the plasterer shall apply up to two coats of mortar (depending on the requirements of the job) to scratch and/or to plumb, rod and square the walls and level the ceilings. The tile setter shall apply the thin-set material or adhesive which shall be the setting bed for his tile."

We believe the above suggested clarification is reasonable and fair and is consistent with the intent of the Joint Board. We urge the Board to adopt it.

Very truly yours,

EDWARD J. LEONARD
Edward J. Leonard
General President

EJL
lah

P-36U

March 15, 1967

Texas 11/9/66

Edward J. Leonard, General President
Operative Plasterers and Cement Masons
International Association
1125 Seventeenth Street N.W.
Washington, D. C. 20006

Thomas Murphy, General President
Bricklayers Masons and Plasterers International Union
Bowen Building
Washington, D. C. 20005

Southwestern Construction
Company
Contractor
P O Box 1204
Houston Texas 77001

Texas State Tile & Terrazzo
Co.
Subcontractor
3115 Gulfcrest Boulevard
Houston Texas

Gentlemen:

At its meeting March 14, 1967, the Joint Board considered President Leonard's request for clarification of its job decision of November 9, 1966 in the jurisdictional dispute between the Operative Plasterers and Cement Masons International Association and the Bricklayers Masons and Plasterers International Union over plumbing, rodding and squaring of walls which are to receive tile, Houston University Science Building job, Houston Texas, Southwestern Construction Company contractor, Texas State Tile & Terrazzo Co. subcontractor, and voted to clarify this job decision as follows.

The agreement of August 22, 1917 between the Operative Plasterers and Cement Masons International Association and the Bricklayers Masons and Plasterers Interna-

tional Union and the decision of record of February 21, 1924 provides that the plumbing, rodding and squaring of all walls which are to receive tile shall be performed by plasterers. Plaster materials for this purpose are normally applied directly to the initial scratch coat. Where no scratch coat is required, such as in the case of clay tile or concrete block walls, the plaster materials are applied directly to such walls.

In the so-called conventional method of setting tile, an additional coat of plaster materials is applied to furnish a setting bed for tile, and there appears to be no dispute between the parties where this method is followed. The work involved in the Joint Board job decision of November 9, 1966 involved the so-called thin-set method for the major part of the work.

The Joint Board voted to clarify its job decision by stating that the coat of plaster material which is applied directly to the initial scratch coat or directly to clay tile or cement block walls is for the primary purpose of plumbing, rodding and squaring of walls to receive tile and, in accordance with the aagreement of record and the decision of record referred to above, shall be assigned to plasterers.

The Joint Board, in recognition of the problems created by having two different trades working at the same time on separately identifiable work operations, further voted that if the tile to be adhered to the coat of plaster material applied to the initial scratch coat of directly to clay tile or cement block walls is set during the same work day in which such coat is applied the plaster materials shall be applied by tile setters in the interest of efficient job operation.

When the tile is not set during the same work day in which the plaster materials are applied to the initial scratch coat or directly to clay tile or cement block walls, the Joint Board voted that the application thereof is for the primary purpose of plumbing, rodding and squaring

the walls to receive tile and shall be assigned to plasterers in accordance with the agreement of record of August 22, 1917 and the decision of record of February 21, 1924.

This action of the Joint Board was predicated upon particular facts and evidence before it regarding this dispute and shall be effective on this particular job only.

Very truly yours,

WILLIAM J. COUR
Chairman

WJC/lp
cc: C. J. Haggerty—B&CT Dept.
D. R. Witcraft—AGC

Texas State Exhibit 1

PROCEDURAL RULES AND REGULATIONS OF THE NATIONAL JOINT BOARD FOR SETTLEMENT OF JURISDICTIONAL DISPUTES BUILDING AND CONSTRUCTION INDUSTRY AND APPEALS BOARD PROCEDURES

July 21, 1965

PROCEDURAL RULES AND REGULATIONS OF THE NATIONAL JOINT BOARD

These procedures shall apply to:

(a) Contractors who employ members of the organizations affiliated with the Building and Construction Trades Department, AFL-CIO, and who have signed a stipulation setting forth that they are willing to be bound by the terms of the agreement establishing the Joint Board, or who are members of a signatory association of contractors with authority to bind its members, or who are parties to a collective bargaining agreement providing for the settlement of jurisdictional disputes under the procedures herein

set forth. The stipulation form adopted by the Joint Board provides:

Date.....

"In signing this stipulation, the undersigned agrees to be bound by the terms and provisions of the agreement effective May 1, 1948, as amended by agreement effective October 1, 1949, creating the National Joint Board for Settlement of Jurisdictional Disputes. In particular, the undersigned agrees to be bound by the provision of the agreement which states: 'any decision or interpretation by the Joint Board (or Hearings Panel) shall immediately be accepted and complied with by all parties signatory to this agreement.' This authorization shall run for the term of the agreement, and shall continue in effect for each year thereafter unless specifically terminated at the renewal date of said agreement which is March 31.

(Signed).....'"

(b) All unions affiliated with the Building and Construction Trades Department, AFL-CIO, in the building and construction industry.

* * *

PROCEDURES USED BY THE JOINT BOARD:

* * *

7. (a) In making a job decision the Joint Board shall utilize the following criteria: Decisions and agreements of record as set forth in the Green Book, valid agreements between affected International Unions attested by the Chairman of the Joint Board, established trade practice and prevailing practice in the locality.

* * *

8. Each job decision of the Joint Board shall state that the job decision was predicated upon the particular facts and evidence before the Joint Board regarding the dispute and shall be effective on the particular job only.

9. The affected Unions and contractors shall promptly comply with each job decision of the Joint Board.

10. In the event any contending International Organization feels that a decision rendered by the National Joint Board has been in error, it shall be privileged, within ten working days of receipt of the decision, either (a) to request reconsideration of a National Joint Board job decision upon submission of additional written evidence; or (b) to request an oral hearing on such decision by the National Joint Board, provided that the job decision has been accepted and put into effect by the affected parties, and further that such job decision remains in continuous effect until reconsidered or an oral hearing is held by the Joint Board. The Chairman shall determine the matter of compliance with the job decision in question and, if it is found to be in accordance with the job decision, shall set a date for such reconsideration or oral hearing. The contending International Unions shall be notified and given opportunity to present written evidence or be heard in the event of an oral hearing. It is permissible at oral hearings for the affected parties to present witnesses. Requests for postponement of an oral hearing must be received by the Joint Board a minimum of forty-eight hours prior to the date scheduled for the hearing.

* * *

13. The Joint Board should not ignore the interests of the consumer in settling jurisdictional disputes but should give due regard to such factors as efficiency and economy of operation.

Texas State Exhibit 2

NATIONAL AGREEMENT

By and Between the
TILE CONTRACTORS' ASSOCIATION OF AMERICA, INCORPORATED

and the

BRICKLAYERS, MASONS AND PLASTERERS' INTERNATIONAL UNION OF AMERICA

AGREEMENT

THIS AGREEMENT, renewed and entered into this nineteenth day of January, 1966, by and between the Tile Contractors' Association of America, Incorporated, Party of the First Part, and the Bricklayers, Masons and Plasterers' International Union of America, Party of the Second Part, shall become operative on January 20, 1966.

ARTICLE I

WITNESSETH:

That in consideration of this Agreement renewed this day, which is to remain in full force and effect until January 20, 1969, unless sooner abrogated by mutual consent of the parties hereto, do each for ourselves and every individual member of our respective organization pledge full compliance with all its terms.

ARTICLE II

Section 1. THIS AGREEMENT pertains to the setting, slabbing or installing of all classes of TILE, whether for interior or exterior purposes, in any public or private building anywhere within the territory of the United States or the Dominion of Canada.

Section 2. Tile Layers Work is defined as:

(a) The laying, cutting or setting of all tile where used for floors, walls, ceilings, walks, promenade roofs, exterior

veneers, stair treads, stair risers, facings, hearths, fireplaces and decorative inserts, together with any marble plinths, thresholds or window stools used in connection with any tile work; also to prepare and set all concrete, cement, brickwork or other foundations or material that may be required to properly set and complete such work.

(b) The application of a coat or coats of mortar, prepared to proper tolerance to receive tile on floors, walls and ceilings regardless of whether the mortar coat is wet or dry at the time the tile is applied to it.

Texas State Exhibit 4

Plan for Settling Jurisdictional Disputes
Nationally and Locally
Approved by
The Building and Construction Trades
Department, AFL-CIO
Agreements and Decisions Rendered Affecting the
Building Industry
By the
American Federation of Labor
Building and Construction Trades Department, AFL-CIO
National Board of Jurisdictional Awards
National Referees John A. Lapp, Peter Eller,
Wm. L. Hutcheson and National Joint Board
April 1, 1965

* * * * * * * * * *

ARTICLE II

* * * * * * * * * *

Sec. 4. It shall be the duty of the Joint Board to consider and decide cases of jurisdictional disputes in the building and construction industry, which disputes are referred to it by any of the International Unions involved in the dispute, or an employer directly affected by the

dispute on the work in which he is engaged or by a participating organization representing such employer.

* * * * * * * * * * *

ARTICLE III

Sec. 1. (a) In making a job decision the Joint Board shall utilize the following criteria: Decisions and agreements of record as set forth in the Green Book, valid agreements between affected International Unions attested by the Chairman of the Joint Board, established trade practice and prevailing practice in the locality.

(b) The Joint Board may at its discretion hold oral hearings on repetitive disputes for the purpose of rendering a decision applying in the locality as defined by the Board.

(c) All agreements and decisions recognized under the provisions of the Constitution of the Building and Construction Trades Department shall be considered as constituting the record.

(d) Any job decision or ruling rendered by the Joint Board under paragraph (b) of this section may be appealed to a Hearings Panel by any of the participating National or International Unions involved or may be referred to a Hearing Panel for a national decision by action of the Joint Board. Any decision rendered by such a Hearings Panel shall immediately become part of the record referred to in paragraph (c) of this section.

(e) In jurisdictional dispute cases where International Unions, members of the Building and Construction Trades Department, AFL-CIO, and participating or stipulated employer national associations, do not have direct representation on the Board hearing a specific case, they may designate a representative to participate in the discussion of such case.

(f) The Joint Board should not ignore the interests of the consumer in settling jurisdictional disputes, but should

give due regard to such factors as efficiency and economy of operation.

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AGREEMENT

(Preparation of Walls and Ceilings to Receive Tile)

Agreement entered into this 22nd day of August, 1917, between the B. M. & P. I. U. and the O. P. & C. F. I. A. pertaining to the preparing or plastering of walls and ceilings which are to receive tile;

First. It is agreed that the plasterers of the O. P. & C. F. I. A. and the B., M. & P. I. U. shall prepare or plaster all walls which are to receive tile. They shall plumb, rod and square all walls and scratch the same so as to guarantee adhesion of the final coat which shall be put on by the Tilelayer to act as a bed for his tile.

Second. It is further agreed that the Plasterers of either the O. P. & C. F. I. A. or the B., M. & P. I. U. shall prepare or plaster all ceilings which are to receive tile. All ceilings must be leveled and rodded and properly scratched so as to guarantee adhesiveness of the final coat which shall be applied by the Tile Setter and act as a bed for his tile.

Third. It is further agreed that the Plasterers shall use only sand and cement in the preparation of work above stipulated unless otherwise specified by the architect.

Fourth. Any member of either organization that violates the above rules shall, upon conviction, be fined the sum of $25.00.

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Decisions Rendered by the National Board for Jurisdictional Awards in the Building Industry.

* * * * * * * * * * *

Plastering Work for Preparation of Walls and Ceilings for Tiling

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union and the Operative Plasterers and Cement Finishers' International Association.)

Decision Rendered February 21, 1924

* * * * * * * * * * *

After reviewing the controversy in its various phases, the determination is reached that the agreement previously existing between the two organizations affords the most practical plan of adjustment, and the following award is therefore made as the decision of the Board:

Plasterers shall prepare or plaster all walls and ceilings which are to receive tile, except the final setting bed, which shall be applied by the Tile Layers; the bath rooms, vestibule and small halls in single private residences shall be plastered by the Tile Setters.

Texas State Exhibit 7

MARTINI
TILE AND TERRAZZO COMPANY
INCORPORATED
1902 Taft Street Phone JA 6-3769
Houston, Texas 77006

SPECIFICATIONS

Rainbo Baking Co.
4104 Leeland
Houston, Texas

System for installing wall tile over masonry, one-coat method.

Metal lath applied over masonry.

Tile setting bed (sand/cement) applied over metal lath.

Bond coat applied over setting bed or to back of tiles, and tile bonded to this coat and grouted.

Texas State Exhibit 12

MARTINI TILE AND TERRAZZO CO., INC.

Stock Requisition

Job No. 6849-T
Date 3-9-67

Name Rainbo Bakery Arch. None

Job Address 4104 Leeland Mr. Stephenson—Engr.

* * * * * * * * * * *

Apply Metal Lath Over Masonry Wall & Setting Bed Over Lath. Hold Sand/Cement Setting Bed As Tight Or Close As Possible. Install Tile Over Neat Coat Of L&M.

Texas State Exhibit 13

AGREEMENT

BY AND BETWEEN
TILE, TERRAZZO AND MARBLE CONTRACTORS
OF HOUSTON, TEXAS

and

THE BRICKLAYERS, MASONS. AND PLASTERERS' INTERNATIONAL UNION OF AMERICA, LOCAL UNION #20 OF HOUSTON, TEXAS, REPRESENTING TILE SETTERS, TERRAZZO WORKERS AND MARBLE SETTERS

* * * * * * * * * * *

ARTICLE II.

The work of Tile, Marble and Terrazzo Mechanics shall be all work recognized as per the National Agreements of the National Tile Contractors Association of America, Inc., National Terrazzo & Mosaic Association, National Association of Marble Dealers and Bricklayers, Mason and Plasterers' International Union of America.

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ARTICLE VIII.

The Wage Schedule as follows:

Hourly Rates

	Jan. 1, 1967	Jan. 1, 1968	Jan. 1, 1969
Journeymen	$4.50	$4.75	$5.00
Foreman	4.70	4.95	5.20
Apprentices			
First Six Months	3.00	3.20	3.40
Second Six Months	3.10	3.30	3.50
Third Six Months	3.20	3.40	3.60
Fourth Six Months	3.30	3.50	3.70
Fifth Six Months	3.40	3.60	3.80
Sixth Six Months	3.60	3.80	4.00

Above rates will be in effect until June 30, 1969, or until changed by mutual agreement.

Texas State Exhibit 14

Plasterers Local Union No. 79

AGREEMENT ENTERED INTO
BY and BETWEEN

The Contractors' Lathing and Plastering Association of Houston, Texas, Inc., a trade association composed of lathing and plastering contractors, hereinafter the "Contractors", and the Plasterers Local Union No. 79 O.P.C. M.I.A. of Houston, Texas hereinafter called the "Union".

ARTICLE I

Recognition

The Union is recognized as bargaining agent for all Plasterers and Plasterer Apprentices whom it lawfully represents, who may be employed by Contractors in the area covered by the present Jurisdiction of the Union. The Jurisdiction being the following counties in the State

of Texas: Austin, Angelina, Brazoria, Brazos, Burleson, Colorado, Fort Bend, Harris, Lavaca, Calhoun, Dewitt, Victoria, Goliad, Jackson, Matagorda, Grimes, Houston, Leon, Madison, Montgomery, Polk, San Jacinto, Trinity, Walker, Waller, Washington, and Wharton.

ARTICLE II

Section 1. Effective July 1, 1965, the hourly rate shall be:

Plasterer Foreman	$4.60
Plasterer Journeyman	$4.35

Effective July 1, 1966 the hourly rate shall be:

Plasterer Foreman	$4.775
Plasterer Journeyman	$4.525

Effective July 1, 1967 the hourly rate shall be:

Plasterer Foreman	$4.925
Plasterer Journeyman	$4.675

Texas State Exhibit 20

CONSTITUTION

Operative Plasterers' and Cement Masons' International Association
of the United States and Canada

* * * * * * * * * *

Plasterers' Jurisdiction

Sec. 118. (a) All interior or exterior plastering of cement, stucco, stone imitation or any patent material when cast, the setting of same, also corner beads when stuck must be done by practical Plasterers of the O.P. & C.M.I.A. This includes the plastering and finishing with hot composition material in vats, compartments or wherever applied; also the taping and pointing of all joints, nailholes and bruises on wallboard, regardless of the type

of materials or tools used; also the setting in place of plasterboards, ground blocks, patent dots, cork plates, brownstone, and acoustical tile including temporary nailing, cutting and fitting in connection with the sticking of same. All acoustic blocks when stuck with any plastic materials, regardless of thickness, shall be the work of the Plasterer only. Also the sticking, nailing and screwing of all composition caps and ornaments. The preparing, scratching and browning of all ceilings and walls when finished with terrazzo, or tile shall be done by Plasterers of this Association, allowing sufficient thickness to allow the applying of the terrazzo or tile and the application of any plastic material to the same must be done by members of the O.P. & C.M.I.A. who are practical Plasterers.

(b) Practical Plasterers are men who are proficient in the use of the hawk and trowel and other implements or tools of the trade.

Local Unions shall have autonomy governing the mixing of all materials but shall not deviate from manufacturers standards or the specifications of the American Standards Association.

General Counsel's Exhibit 6

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-THREE

Case No. 23-CD-133

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF HOUSTON, TEXAS

and

SOUTHWESTERN CONSTRUCTION COMPANY

Case No. 23-CD-137

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF HOUSTON, TEXAS

and

MARTINI TILE AND TERRAZZO COMPANY

STIPULATION

1. That the work in dispute in both cases is that described in the Decision and Determination of the Disputes reported at 167 NLRB No. 23, and the record of the 10(k) proceeding itself.

2. (a) That Texas State Tile and Terrazzo, Inc. (Texas State) assigned the work on the M. D. Anderson Library job (Library job) in dispute to its employees who are members of or represented by Tile, Terrazzo and Marble Setters Local Union No. 20 (Tile Setters).

2. (b) That Martini Tile and Terrazzo Company (Martini) assigned the work in dispute on the Rainbo Baking Company job (Rainbo) to its employees who are members of or represented by the Tile Setters.

3. That Respondent claimed the work in No. 1 and No. 2 above at all times material herein.

4. That on January 24, 1967, Respondent established a picket at the Library job, the legend of which reads:

> Plasterers Local 79 protest the refusal of Texas State Tile and Terrazzo to comply with National Joint Board. Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or concerted refusal to work.

5. That the picket described in No. 4 above remained at the Library job until February 10, 1967, at which time the picketing ceased in compliance with an injunction issued on such date by the United States District Court for the Southern District of Texas, Houston Division.

6. That on March 17, 1967, Respondent placed a picket at the Rainbo job, the legend of which read:

> "Plasterers Local No. 79 protests substandard conditions Martini Tile Co., Inc., Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or a concerted refusal to work."

7. That during the period of the picketing the Rainbo job described in paragraph 6 above, certain crafts did not work.

8. Respondent's object in posting the picket line described in No. 6 above, was to force a change in the assignment of the work in dispute on the Rainbo job which was being installed by the employees of Martini who were members of or represented by the Tile Setters to employees who are members of or represented by the Plasterers.

9. On August 22, 1967, the Board issued, at 167 NLRB No. 23, its decision and Determination of Disputes in the 10(k) proceeding involving Cases Nos. 23-CD-133 and 23-CD-137 whereby it awarded the work in dispute, to

employees of Texas Tile and Martini who are represented by the Tile Setters.

10. At no time following the issuance of the Board's Decision and Determination of Disputes on August 22, 1967, has Respondent given written notification to the Regional Director for Region 23 whether it would refrain from forcing or requiring Texas Tile and/or Martini by means proscribed in Section 8(b)(4)(D) to assign the work in dispute to Plasterers rather than tile setters.

RICHARD J. LINTON
Richard J. Linton
Counsel for the General Counsel
DONALD J. CAPUANO
Donald J. Capuano
Attorney for Respondent

LESLIE THACKER
Attorney for the Tile Setters, Tile Setters Helpers, Texas State and Martini

KENNETH R. CARR
Kenneth R. Carr
Attorney for Southwestern Construction Company

Excerpts From Transcript Before Hearing Examiner

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD
Twenty-Third Region

Case No. 23-CD-133

In the Matter of:

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF HOUSTON, TEXAS

and

SOUTHWESTERN CONSTRUCTION COMPANY

Case No. 23-CD-137

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF HOUSTON, TEXAS

and

MARTINI TILE AND TERRAZZO COMPANY

7620 Federal Office Building,
515 Rusk Avenue,
Houston, Texas,
Monday, October 30, 1967.

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock, a. m.

Before:

GORDON J. MYATT, Esq., Trial Examiner.

Appearances:

RICHARD J. LINTON, Esq.,
6617 Federal Office Building,
515 Rusk Avenue, Houston, Texas
77002, appearing as counsel for the
General Counsel.

[2] FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI,

By: KENNETH R. CARR, Esq.,
Bank of the Southwest Building, Houston, Texas, appearing on behalf of Southwestern Construction Company, Charging Party.

LESLIE THACKER, Esq.,
2711 Woodhead Street, Houston, Texas, appearing on behalf of Martini Tile and Terrazzo Company, Charging Party.

O'DONOGHUE & O'DONOGHUE,
By: DONALD J. CAPUANO, Esq.,
1912 Sunderland Place, N.W., Washington, D.C., appearing on behalf of Plasterers Local Union No. 79, Operative Plasterers and Cement Masons International Association of Houston, Texas, Respondent.

* * * * * * * * * *

[14] Trial Examiner: Any thing further, Mr. General Counsel?

Mr. Linton Your Honor, at this time I would move that the exhibits which have been introduced constitute the entire record in this case, and that a hearing before the Trial Examiner, further hearing, be waived, and that the entire record be submitted directly to the Board for the issuance of findings of fact, conclusions of law and a decision, and that such matters, the findings of fact, conclusions of law by the Trial Examiner, and the issuance of a Trial Examiner's Decision, be waived.

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[15] Trial Examiner: Mr. Capuano?

Mr. Capuano: I am in agreement that the case should be transferred to the Board. May I make a comment about what Miss Thacker said?

Trial Examiner: Yes.

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[17] Trial Examiner: As I view this matter, I am not prepared to honor your request to stay this proceeding. This proceeding is confined to whether or not there has been an unfair labor practice committed and also, as I see it, whether or not there has been compliance with the Board's award. Your motion goes to the scope of the Board's award in an effort to enlarge it, as I understand it. And therefore, I feel at this point that this proceeding should not be stayed.

I also think there is some merit in what Mr. Capuano has indicated, that this matter, itself, should be before the Board inasmuch as your motion to open the 10(k) is before the Board for decision. So I do not feel that you would be prejudiced in any way. And for these reasons I am going to deny your request to stay this proceeding.

And in keeping with that I will grant the request to transfer the entire record of this case to the Board, all parties waiving a Trial Examiner's findings of fact, conclusions of law and a decision in this case, and requesting that the Board make the findings of fact and conclusions of [18] law and issue its decision herein.

That being the case, unless there is anything more anybody wants to bring out, we can conclude this hearing.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,073

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

TEXAS STATE TILE & TERRAZZO CO., INC., ET AL., AND LOCAL UNION 20 BRICKLAYERS, ETC., LOCAL UNION 108 INT'L ASSOC. OF MARBLE, ETC., POLISHERS, ET AL., INTERVENORS

On Petition to Review and on Cross-Petition to Enforce an Order of the National Labor Relations Board

Decided June 30, 1970

Mr. Donald J. Capuano, with whom *Mr. Martin F. O'Donoghue* was on the brief, for petitioner.

Mr. Peter Ames Eveleth, Attorney, National Labor Relations Board, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, *Elliott Moore* and *Hans J. Lehmann*, Attorneys, National Labor Relations Board, were on the brief, for respondent.

Mr. Wayne S. Bishop for intervenors, Tile Contractors Association of America, Inc., Texas State Tile & Terrazzo Co., et al.

Mr. Jerry D. Anker for union intervenors.

Messrs. Louis Sherman and *Elihu I. Leifer* filed a brief on behalf of the Building and Construction Trades Department, AFL-CIO, as *amicus curiae*.

Miss Leslie Thacker filed a brief on behalf of Ceramic Tile institute of America, et al., as *amicus curiae.*

Before: McGOWAN, LEVENTHAL and MACKINNON, *Circuit Judges.*

LEVENTHAL, *Circuit Judge*: This appeal concerns the provisions of the National Labor Relations Act ("Act"), 29 U.S.C. § 141 et seq., applicable to jurisdictional disputes. The particular jurisdictional dispute involves whether the job of applying a coat of mortar on a wall to be tiled should be given to the Plasterers or the Tile Setters (that is, to petitioner, Plasterers Local Union No. 79, Operative Plasterers and Cement Masons' International Assn., AFL-CIO, or to intervenor, Tile Terrazzo and Marble Setters Local Union No. 20 of the Bricklayers, Masons and Plasterers International Union).

Following a hearing pursuant to § 10(k) of the National Labor Relations Act,[1] the National Labor Relations Board, hereafter "Board," awarded the work in dispute to the Tile Setters.[2] The issue is whether it was error for the Board to have conducted a 10(k) hearing after being timely advised that both unions had agreed to be bound by the decisions of the National Joint Board for the Settlement of Jurisdictional Disputes, an arbitration panel established by the Building Trades Department, AFL-CIO, hereafter the "Joint Board."

The Plasterers claim the Joint Board awarded the work to them,[3] and that it was error for the Board to make a

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[1] 29 U.S.C. § 160(k).

[2] The Board's Decision and Determination of Disputes under § 10(k) was issued on August 22, 1967, and is reported at 167 NLRB No. 23.

[3] The Plasterers also argue that assuming statutory authority to make an award, the Board's decision and order were arbitrary as reflecting an excessive weight given by the Board to the factor of the employer's assignment, and a failure to give due consideration to other factors which supported the Plasterers claim. Our disposition of this appeal makes it unnecessary to reach this question.

10(k) determination. The Board's position is that while it may not hold a 10(k) hearing when the parties to a jurisdictional dispute have agreed on a method for voluntry adjustment of the dispute, this bar does not arise unless all the parties to the dispute are bound by the voluntry adjustment procedure. Because the Board considers the employer to be a party to the dispute, and because the employers making work assignments in the instant disputes were not bound by the determinations of the Joint Board, the Board contends that it properly held a 10(k) hearing.

These questions are before this court on the petition of Plasterers to review, and the cross-application of the Board to enforce, a June 27, 1968 order in which the Board found the Plasterers had committed an unfair labor practice in violation of § 8(b)(4)(D) of the Act [4] by picketing Texas State Tile and Terrazzo Company (Texas State), and Martini Tile and Terrazzo Company (Martini), with the object of forcing these employers to assign the disputed work to employees represented by Plasterers.[5]

We agree with the plasterers that the Board may not properly proceed to determine a jurisdictional dispute pursuant to § 10(k) when the disputing unions have agreed to settle their dispute through binding arbitration. In as much as the Board's finding of an 8(b)(4)(D) violation incorporates and relies on an invalid 10(k) proceeding and award, the Board's order cannot be enforced.

I *The Jurisdictional Disputes*

The focus of these jurisdictional disputes can be traced to the development in the mid-1950's of the thin-set or adhesive method of applying tile. Previously it was necessary to set tile in a bed of wet plaster so that moisture would not be absorbed from the bonding agent before it

[4] 29 U.S.C. § 158(b)(4)(D).

[5] The Board's Decision and Order in the unfair labor practice phase of the case is reported at 172 NLRB No. 77.

hardened and formed a firm bond. The application of this setting bed or float coat was the work of tile setters. The thin-set method, on the other hand, employed new bonding agents which made it possible to apply tile directly to a smooth surface of dry plaster on a thin coat of dry-set mortar. The Tile Setters contended that they should prepare this smooth plaster surface just as they had prepared the wet setting bed. The Plasterers took the position that the tile setter was only entitled to apply his setting bed and that in the thin-set method it was the dry-set mortar and not the smooth and dry plaster surface which constituted the setting bed.

The order concerns picketing which was directed against two different employers, at the sites of two unrelated jobs. The first was the M. D. Anderson Library Job at the University of Houston. Southwestern Construction Co., the general contractor for an addition to the library, had subcontracted to Texas State, a tile contractor employing members of the Tile Setters Union, the work of preparing walls and applying tile to four stairwells and two restrooms on each floor of the eight story building. The tile setters did their initial work in the lavatories where they applied the smooth coat of plaster. The Plasterers claimed this work as theirs, and when this claim was rejected by Tile Setters they submitted the dispute to the Joint Board.

On November 9, 1966, the Joint Board awarded the work in dispute to the Plasterers except that "any coat to be applied wet the same day under tile" was to be placed by Tile Setters. The award stated: "In the thin-set or adhesive method of applying tile to walls and ceilings, the plasterer shall apply the first and second coats of mortar that is the scratch coat and plumb coat. The plasterers shall plumb, rod and square all walls, rod and level all ceilings and the tile setter shall apply the final setting bed for his tile."

Plasterers thereupon claimed the remaining work of applying a smooth plaster coat on the basis of the award. The Tile Setters refused to relinquish the work, contending

that the smooth plaster coat was the tile setter's "setting bed" and that therefore the Joint Board Award actually supported their claim. On January 24, 1967, Plasterers established a picketline on the jobsite and a work stoppage ensued. Southwestern Construction Company filed an unfair labor practice charge with the Board against Plasterers. On February 10, 1967, the United States District Court for the Southern District of Texas granted the application of the Board's regional director for an injunction against the picketing and the pickets were removed.

On March 6, 1967, Plasterers requested that the Joint Board clarify its award in view of the contention of the Tile Setters that the award favored their claim. On March 15, 1967, the Joint Board issued a clarification which is set out in part in the footnote.[6] The Joint Board made clear that the job of applying a smooth coat of plaster material to an initial scratch coat or to cement or clay tile walls was the work of the Plasterers unless the tile is set the same work day that such coat of plaster is applied.

The second job at which picketing occurred was at the Rainbo Bakery. Here there was no general contractor. Martini, who did not employ plasterers, had a direct contract with the owner calling for the tiling of two walls in one area of the bakery. Tile setters undertook to perform

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[6] The Joint Board voted to clarify its job decision by stating that the coat of plaster material which is applied directly to the initial scratch coat or directly to clay tile or cement block walls is for the primary purpose of plumbing, rodding and squaring of walls to receive tile and, in accordance with the agreement of record and the decision of record referred to above, shall be assigned to plasterers.

The Joint Board, in recognition of the problems created by having two different trades working at the same time on separately identifiable work operations, further voted that if the tile to be adhered to the coat of plaster material applied to the initial scratch coat or directly to clay tile or cement block walls is set during the same work day in which such coat is applied the plaster materials shall be applied by tile setters in the interest of efficient job operation.

the application of a smooth coat of plaster to metal lath which had been tacked to masonry walls, and the application of dry-set mortar and tile to this plaster surface. The dispute was never submitted to the Joint Board. On March 17, 1967, two days after the clarification by the Joint Board described above, Plasterers picketed the jobsite for the purpose of having transferred to them that part of the work consisting of application of the smooth coat.

II *The NLRB Proceedings*

On April 6, 7 and 10 through 14, 1967, the Board held a consolidated § 10(k) hearing to determine these jurisdictional disputes. It issued its decision and determination on August 22, 1967. The Board rejected the Plasterers' contention that the notice of hearing should be quashed because the disputing unions had agreed on a method for voluntary settlement. It stated: "The Board has consistently held that the employer who assigned the disputed work must be a party to an agreement that purports to settle an existing jurisdictional dispute." On the merits of the dispute, the Board examined what it considered to be the relevant factors and concluded that Tile Setters were entitled to the work in dispute inasmuch as there was no significant difference between the two employee groups in terms of skill, and the various factors involved were all consistent with the employers' assignment of the disputed work.

When Plasterers refused to comply with the Board's determination of the work disputes, the General Counsel of the Board issued a complaint against petitioner alleging a violation of § 8(b)(4)(D) of the Act. At the unfair labor practice hearing held on October 30, 1967, the parties agreed to submit on the record in the § 10(k) proceeding. In its decision and order of June 27, 1968, the Board again rejected Plasterers' claim that the 10(k) proceeding was improperly held and found that the union had violated § 8(b)(4)(D). The Board's order provides that

the union shall cease and desist from the use of prohibited means to force or require Texas State or Martini to assign to Plasterers the disputed work at the Anderson Library and Rainbo jobs. The Board also ordered that Plasterers take the affirmative action of posting a notice indicating their intention to abide by the Board's cease and desist order. The Board's petition for enforcement is predicated on Plasterers' refusal to take this affirmative action.

III *Mootness*

A motion to dismiss this case as moot has been filed by intervenor Tile Setters, and the other union intervenors associated with them.[7] They argue that mootness follows from the fact that the Anderson Library and Rainbo Bakery jobs have been completed and that the Board's cease and desist order now proscribes conduct in which it would be impossible for the Plasterers to engage. Both Plasterers and the Board have filed memoranda arguing that the case is not moot.

Cease and desist orders of the Board aimed at remedying an unfair labor practice are frequently framed to account for changes in circumstances following the illegal practice. However, the issue of whether an unfair labor practice occurred is not mooted because the particular job involved has been completed. *Local 74, United Brotherhood of Carpenters & Joiners* v. *NLRB*, 341 U.S. 707,

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[7] The other Union Intervenors are: Bricklayers, Masons and Plasters International Union of America, hereafter "Bricklayers", International Association of Marble, Slate and Stone Polishers, Rubbers & Sawyers, Tile & Marble Setters' Helpers & Marble, Mosaic and Terrazzo Workers' Helpers, hereafter "Helpers," and Local 108 of the Helpers. Bricklayers is the parent organization of Tile Setters Local 20, whose members were performing the work sought by the Plasterers. The Helpers Union was also interested in the dispute because its members work directly with the Tile Setters, and would be replaced by members of another organization (Laborers' International Union of America) if the disputed work were assigned to the Plasterers.

715 (1951); *NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 271 (1938); *NLRB* v. *Plumbers Union of Nassau County*, 299 F.2d 497 (2d Cir. 1962).

There is precedent permitting the Board to quash a 10(k) proceeding where there could only be a stale hearing, held three years after the incident, and to dismiss the 8(b)(4)(D) complaint on the ground that "no affirmative order issued by the Board could have any effect on the parties to the original controversy since the work had long since been completed," *Tip Top Roofers, Inc.* v. *NLRB*, 324 F.2d 773 (5th Cir. 1963). But here the Board has issued an affirmative order, requiring *inter alia* the posting of notices, and Plasterers has refused to comply. We see no basis on this record for concluding that the Board acted impermissibly in viewing the controversy as being sufficiently broad and enduring to make appropriate affirmative relief. If the posting order was lawful the Board was entitled to a judicial decree of enforcement. The case is not moot.

IV *Proper Construction of Section 10(k) of the National Labor Relations Act*

The Board's reliance on the 10(k) record and determination in reaching its conclusion that Plasterers had committed an unfair labor practice preserves the 10(k) issue as a part of the review of the unfair labor practice determination.[8] The case turns on the proper construction of § 10(k) of the National Labor Relations Act, one of the provisions added by the Taft-Hartley Amendments of 1947 as a result of Congressional concern over work stoppages arising out of jurisdictional disputes between unions.

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[8] "Since there is no independent review of § 10(k) work assignments, the only stage at which the [union] can contest the work award is on review of the § 8(b)(4)(i)(ii)(D) unfair labor practice order. If the § 10(k) order fails, the unfair labor practice order falls with it." NLRB v. Local 991, ILA, 332 F.2d 66 (5th Cir. 1964).

Another provision added at the same time was § 8(b) (4) (D), set forth in the footnote,[9] which broadly prohibits a union from picketing and other actions to induce employees not to perform services for their employer with the object of forcing the employer to assign work to a particular union or craft.

Section 10(k), also set forth in footnote 9, empowers the Board to determine the jurisdictional dispute out of which the unfair labor practice charge has arisen, unless,

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[9] (b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

* * * *

However, § 8(b) (4) (D) must be read in the light of § 10(k) which provides:

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

in the words of an abstention provision, "the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute."

The Board held this abstention language of § 10(k) inapplicable, even though the unions had agreed to be bound by the decisions of the Joint Board for the Settlement of Jurisdictional Disputes—a joint board with representatives of employers and employees,[10]—on the ground that the employer was also a "party" and had not agreed to this method for voluntary adjustment.

In our view the Board erred in claiming authority under § 10(k) of the Act to determine the merits of a jurisdictional dispute between two unions when the unions had agreed on a method for binding arbitration of their disputes.

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[10] The amicus brief filed by the Building and Construction Trades Department, AFL-CIO, urging the adoption of the construction of § 10(k) advanced by Plasterers, describes the operation of the Joint Board. Article X of the Department's constitution provides that all jurisdictional disputes shall be settled and adjusted according to a plan established by the Department and that such plan "shall be recognized as final and binding upon the Department and upon all affiliated National or International Unions and their affiliated Local Unions." The disputing unions in the instant case, the Bricklayers and the Plasterers International Unions and their affiliated locals, the petitioner and intervenor, are affiliated with the Department.

The present "Plan for National Joint Board for Settlement of Jurisdictional Disputes" became effective on April 1, 1965. The Plan operates through the Joint Board, the Appeals Board and Hearings Panels established to render nationally effective decisions on an ad hoc basis. These Boards and Panels have both labor and contractor members, and the criteria for decision include interunion agreements dividing work (the Green Book), established trade practice, in the locality and such factors as efficiency and economy of operation. The machinery of the Plan is operative regardless of whether or not the particular employer affected by such a dispute decides to be bound to the Plan. The Plan provides that any decision of the Joint Board, or of the Appeals Board if an appeal is taken, "shall be immediately accepted and complied with by all parties to this Agreement."

Meaning of Abstention Provision of § 10(k)

The crucial abstention provision does not require voluntary adjustment, or agreement on a method for voluntary adjustment, on the part of all parties to the 8(b)(4)(D) proceeding, or even all parties to the 10(k) proceeding. Abstention is commanded when "the parties to such dispute" have adjusted the dispute, or agreed on a method for the adjustment of the dispute. The text of § 10(k) shows that the term "such dispute" refers to the underlying jurisdictional "dispute out of which such unfair labor practice shall have arisen." It is not the employer but the rival unions (or other employee groups) who are the parties to the jurisdictional dispute contesting which employees are entitled to seek the work in question.

Congress could have written § 10(k) so that the employer would be a necessary party to a procedure for voluntary settlement by requiring agreement on such a procedure by both the parties to the unfair labor practice charge and the parties to the underlying dispute out of which that charge arises. That Congress did not choose this approach but instead required only agreement by the unions involved in the underlying jurisdictional dispute is easily understood in the light of the refusal of Congress to bind the employer to the Board's determination of a jurisdictional dispute under § 10(k). Rather than enacting a comprehensive solution to the work assignment problem, which would have required provision for binding the employer to a determination concerning who was entitled to the work, Congress went only so far as to assure that at least the employer would not be plagued by the failure of the disputing unions to resolve their dispute. The fact that the employer is not bound by a 10(k) determination of the Board is persuasive evidence that Congress did not intend a voluntary procedure for adjustment to be held inadequate because the employer is not bound.

Although the precise question before us is, in any meaningful sense, one of first impression in the federal courts,[11] we find authority for our view not only in the text of § 10(k) but also in judicial precedents construing the provisions of the Act dealing with jurisdictional disputes and in the legislative history and congressional purpose underlying these provisions.

Protection Pending Determination under Voluntary Procedure

We interject preliminarily the observation that the provision for Board abstention pending resort to a voluntary adjustment procedure does not remove the machinery provided by the Act for interim protection against work stoppages.

Congress gave to the Board authority to insure that the jurisdictional dispute will not be the cause for further work stoppage while either voluntary procedures, or Board-conducted procedures for determination under § 10 (k), are running their course. Section 10 (*l*), quoted in the footnote,[12] authorizes the Board to seek a District

[11] We do not read the cases cited in footnote 2 of the dissenting opinion as authoritative support for the Board's position. While we would not pass over a reasoned view contrary to the one here taken, these cases do not attempt to grapple with the issue before us apparently for the reason that they are not cases where the Board's interpretation was challenged or where disposition turned on the resolution of this issue. The Board's brief candidly admits that these cases have no more than "adverted to" the issue before us and contends merely that they "reflect" its view.

[12] (*l*) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any

Court injunction whenever the cognizant Board employee has reasonable cause to believe in the truth of a charge of an unfair labor practice violative of § 8(b) (4) (D). That injunction remains in effect "pending the final adjudication of the Board with respect to such matter." Where the Board is conducting a 10(k) proceeding it must make a final determination under § 10(k) before it may pro-

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United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

The vigilance of the General Counsel in applying for injunctions in 8(b) (4) (D) cases was noted in K. Strand, Jurisdictional Disputes in Construction: The Causes, the Joint Board and The NLRB 119, n. 1 (1961).

ceed to final adjudication of an 8(b)(4)(D) charge. In a case governed by the abstention provision of § 10(k) the proceeding on the 8(b)(4)(D) charge stays in being and is not dismissed unless and until the parties have not only agreed on methods for voluntary adjustment but have actually reached a voluntary adjustment of their dispute. Thus the Act provides a "speedy remedy . . . to preserve the status quo" [13] and avoids any hiatus in protection against forbidden means of pressing jurisdictional claims.

CBS Opinion

Focusing on § 10(k) we find guidance and indeed instruction on its meaning, its inter-relationship with § 8(b)(4)(D), and the pertinent legislative history, in *NLRB* v. *Radio and Television Broadcast Engineers Union* [*CBS*], 364 U.S. 573 (1961).

First, as to the meaning of the terms of § 10(k), the Supreme Court said (364 U.S. at 579): "[T]he clause 'the dispute out of which such unfair labor practice shall have arisen' can have no other meaning except a jurisdictional dispute under § 8(b)(4)(D) which is a dispute between two or more groups of employees over which is entitled to do certain work for an employer." Since a jurisdictional dispute for purposes of § 10(k) is a "dispute between two or more groups of employees," it follows that these employee groups are "the parties to such dispute" for purposes of determining whether there exists a voluntary adjustment procedure within the abstention provision of 10(k).

Second, as to the purpose of § 10(k), the Court stressed that "§ 10(k) offers strong inducements to quarrelling unions to settle their differences . . . ." 364 U.S. at 577.[14]

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[13] Local 450, International Union of Operating Engineers, AFL-CIO v. Elliott, Regional Director, 256 F.2d 630, 634 (5th Cir. 1958).

[14] This is reenforced by the Court's reference, to the history of these provisions, which came in the wake of a "continuing and

Where the quarrelling unions have agreed on a procedure for settling their differences, the purpose of § 10(k) to induce settlement is manifestly served by respecting their use of the agreed procedure.

As to the purpose of § 10(k) and § 8(b)(4)(D) taken together, the Court noted that the legislative history contained a recognition of "the necessity of enacting legislation to protect employers from being 'the helpless victims of quarrels that do not concern them at all'," *id.* at 580-81, i.e. to protect the neutral employer caught in the crossfire between the disputing unions and unable to satisfy either, in other words "caught between the devil and the deep blue." 364 U.S. at 575. The purpose of protecting the neutral employer is fully served by any binding settlement between the disputing employee groups. The neutral employer is one who cares not how the dispute is decided but wants merely that it be decided.

Further Examination of Legislative History

We have undertaken a fresh examination of the relevant legislative history. That history forcefully supports the conclusion that Congress intended in § 10(k) to encourage disputing unions to establish inter-union machinery for settling jurisdiction disputes and to afford them an opportunity to exhaust this machinery.

The original House bill contained nothing comparable to § 10(k). Senator Morse, who proposed the forerunner provision which emerged, with relatively minor modification, as § 10(k), prepared a "definitional" memorandum,

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widely expressed dissatisfaction with jurisdictional strikes." *See* 364 U.S. at 580, where the Court continued:

> As one of the forerunners to these very provisions of the Act, President Truman told the Congress in 1947 that disputes "involving the question of which labor union is entitled to perform a particular task" should be settled, and that if the "rival unions are unable to settle such disputes themselves, provision must be made for peaceful and binding determination of the issues."

which stated that while there are various kinds of "jurisdictional disputes" they have as their common ingredient a controversy between two or more labor unions." I Legis. Hist. 951.[15]

Senator Morse proposed a subsection (k) which, as appears from its text in the footnote,[16] is virtually the same as what is now § 10(k). It provided for Board determination of "the dispute out of which such unfair labor practice shall have arisen" unless "the parties to such dispute . . . have adjusted or agreed upon methods for the voluntary adjustment of such dispute." (Senator Morse also proposed enlargement of definition of unfair labor practices and authority in the Board to seek Federal injunctions pending determination of the disputes.) In supporting his proposal he referred to his own experience during World War II as a member of the War Labor Board whose undertaking of jurisdiction to determine jurisdictional dispute work stoppages resulted in a policy whereby "we would give the union leaders involved in a jurisdictional dispute 24 hours to proceed to settle the

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[15] "Legis. Hist." refers to the compiled Legislative History of the Labor Management Relations Act, 1947, published by the NLRB (1948).

[16] *See* II Legis. Hist. 987: "(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (2) (A) of section 8(b), the Board is empowered to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute, unless, within 10 days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or the arbitrator appointed by the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

The § 8(b) (2) (A) proposed by Senator Morse was similar to what has become § 8(b) (4) (D), though it defined an unfair labor practice in terms of an inducement to refuse services "because particular work tasks of such employer or any other employer are performed by employees who are or are not members of a particular labor organization." II Legis. Hist. 986.

dispute without a work stoppage, and upon their failure to do so we would appoint an arbitrator whose decision would be final and binding." And he predicted that the same incentive to union settlement would follow from the post-war adoption of his proposal to amend the National Labor Relations Act. He stated:

> [P]robably one of the greatest benefits that will come from the adoption of such amendments to the Wagner Act as I am proposing this afternoon will be action on the part of the unions themselves to see to it that it does not become necessary, unless in exceptional cases, to resort to the machinery which I have proposed in these amendments . . . . because the unions themselves will proceed to establish within their own organizations machinery capable of settling such disputes short of economic action.[17]

While in some respects the Congress departed from Senator Morse's proposals,[18] Congress retained the thought obtained from his subsection (k), of a machinery for Board determination, an abstention provision where the parties agree on a procedure for settlement, and of an incentive to determination by the parties to the dispute. And there can be no doubt that the parties to the jurisdictional dispute were conceived of as the rival unions, or employee groups. This appears not only from the presentation of Senator Morse, but from the use of the same core concept of the underlying dispute as the jurisdictional dispute between the unions, in the House Conference Report, a document of highest standing in ascertaining legislative intent.

In its recommendation for adoption of § 10(k), the House Conference Report stated:

> The Senate amendment also contained a new section 10(k), which had no counterpart in the House bill.

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[17] II Legis. Hist. 983.

[18] His subsection (k) was modified so as to make Board determination compulsory rather than discretionary and to remove the provision authorizing reference by the Board to an arbitrator.

> This section would empower and direct the Board to hear and determine *disputes between unions* giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes). [Emphasis added.] [19]

There was general agreement on the view that § 10(k) had merit as stimulating settlement machinery *within the ranks of labor*, agreement even from legislators opposed to other elements of the new law.[20]

Consideration of the Board's Contrary Construction of § 10(k)

The meaning of § 10(k) as we understand it is contrary to the construction announced by the Board. That agency's construction is entitled to deference. However, the text, legislative history and purpose, and precedent, combine to negative the aura of doubt which creates the occasion for giving weight to the Board's construction. *See CBS*, *supra*, at 585; *Truck Drivers and Helpers* v. *NLRB*, 101 U.S. App. D.C. 420, 249 F.2d 512 (1957), *cert. denied*, 355 U.S. 958 (1958). If there was room for doubt prior to *CBS*, that decision should have alerted the Board to modify its interpretation.[21]

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[19] I Legis. Hist. 561.

[20] *See* Legis. Hist. 1046, setting forth Senator Murray's favorable comment on this provision:

> We are confident that the mere threat of governmental action will have a beneficial effect in stimulating labor organizations to set up appropriate machinery for the settlement of such controversies within their own ranks. where they properly should be settled.

[21] In the wake of *CBS*, departing as it did from long-standing precedents and approach of the Board, commentators probing the various interrelated problems in depth attacked the Board's continuance of its definition of "parties" for purposes of § 10(k) abstention provision.

See Sussman, *Section 10(k): Mandate for Change?*, 1967 B.U.L. REV. 201, 229 ("The NLRB is incorrect in presently requiring that the employer be a party to an agreement procedure before it satisfies the standards necessary to avoid a Section 10(k) hearing"); *ABA Section on Labor Relations Law, Report of the Special Com-*

Nor is the Board's construction entitled to greater deference because of the mere fact that the 1959 amendments to the Taft Hartley Act did not modify § 10(k). Reenactment of a section of law does not of itself constitute conclusive legislative approval of either decisions or administrative regulations construing the provision, in the absence of a showing that the attention of Congress was specifically directed to the matter at hand. That is the teaching of *Helvering* v. *Hallock*, 309 U.S. 106 (1940), and *Girouard* v. *United States*, 328 U.S. 61 (1946), decisions whose vitality is underscored by the very recent opinion in *Boys Markets, Inc.* v. *Retail Clerk's Union*, —— U.S. —— (June 1, 1970). In *Boys Market* the Supreme Court reiterated its stricture against assigning conclusive weight to congressional silence as acceptance of a ruling "in the absence of persuasive circumstances evidencing a clear design" that congressional inaction denoted acquiescence.

Although the Taft-Hartley Act was amended in 1959, there is no indication that Congress gave consideration to the issue now before us, or even to the subject of jurisdictional strikes. It's inaction concerning a provision whose meaning we do not find really doubtful is not accompanied by any circumstances or indications from which we can discern a "clear design" to accept the Board's rulings.

Additional Court Precedent

We are in accord with the reasoning in *Penello* v. *Local Union No. 59, Sheet Metal Wkrs. Int. Assn.*, 195 F.Supp. 458 (D.Del. 1961), which rejected the view that the employer's resistance "could be the sole factor making inoperative" the "voluntary adjustment" abstention provision of §10(k). Judge Wright declared (at p. 466):

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mittee on the Building and Construction and Industry 452, 456 (1965) ("By the term 'parties' those legislators who discussed the matter indicated that Congress means the disputing unions themselves."); Cohen, *The NLRB and Section 10(k): A Study of the Reluctant Dragon*, 14 LAB. L.J. 905, 909 (1963); Note, 77 YALE L.J. 1191, 1201-02 (1968).

> Petitioner would have the Court ignore this policy of § 10(k), however, for this theory apparently is that no agreement between the groups of employees involved can stay the operation of § 8(b)(4)(D) so long as the employer does not agree. But this argument proves too much, for not only does the Supreme Court view the policies of § 10(k) as directed towards inducing voluntary settlement between the groups of employees involved, but also the language of that section would seem to compel it.

Rejection of Policy Argument of Board Counsel Overstressing Need To Obtain Employer Acquiescence

To this court counsel for the Board presented an argument on policy grounds that the Board's construction of § 10(k) is sound because it is best suited to preservation of industrial peace. We were not specifically cited to Board opinions wherein this policy was set forth by the Board as contrasted with argument of counsel. *See Braniff Airways, Inc.* v. *CAB*, 126 U.S. App. D.C. 399, 379 F.2d 453 (1967). But let us consider the contention on its merits.

Board counsel argue (Brief at 17):

> Employer acceptance of the "voluntary adjustment" is a prerequisite of final resolution of the dispute, because the employer does not commit an unfair labor practice by ignoring the award made under Section 10(k). . . . Securing the employer's participation in the dispute-settlement phase enhances the likelihood . . . that he will accept the result. . . .

A similar starting point, that the employer is not bound by the 10(k) determination was the premise of the argument made by the Board in CBS—and without success.[22]

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[22] It argued that if a striking union which had no claim to the work under a Board order or certification, or a contract, established its right to the work upon the basis of such factors as custom, tradition, etc., it would be necessary, in order to prevent the 10(k)

This approach harbors the difficulty of a built-in tendency (not necessarily an absolute rule) to give controlling weight to the determination of the employer—because he is not required to comply with the determination of the Board. A similar appraisal was part of the Court's reasoning in *CBS* for rejecting the Board construction there involved (364 U.S. at 579):

> For, in the vast majority of cases, such a narrow determination would leave the broader problem of work assignments in the hands of the employer, exactly where it was before enactment of § 10(k)—with the same old basic jurisdictional dispute likely continuing to vex him, and the rival unions, short of striking, would still be free to adopt other forms of pressure upon the employer.

Scope Given Voluntary Arbitration Procedures

Our conclusion that agreement for binding arbitration between the disputing unions is effective to stay a determination by the Board under § 10(k) is also supported by the general principle that full scope should be given to voluntary arbitration procedures. *Carey* v. *Westinghouse Corp.*, 375 U.S. 261 (1964). Not least of the advantages is the relative speed of voluntary arbitration, as compared with Board adjudicatory procedures—a matter of manifest significance in the handling of jurisdictional strikes.[23]

Importance of Permanent Resolution of Dispute

Furthermore, and significantly, the availability of a binding agreement between the disputing unions creates

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determination from being "virtually pointless," to construe 8(b)(4)(D) as permitting a union to strike to compel compliance with a 10(k) award. (Br. for NLRB at 9, 10, 20-26.) This would "encourage the very jurisdictional strikes which the Sections were intended to prevent." (Br. for NLRB at 25.)

[23] K. Strand, Jurisdictional Disputes in Construction: The Causes, The Joint Board and the NLRB 103-104 (1961).

means of enforcing a permanent resolution of the jurisdictional dispute not otherwise available to the Board. The Act does not authorize the Board to compel an employer to change his assignment, or a union to renounce an assignment that the employer is willing to give. But an award arising out of voluntary binding arbitration can be enforced by peaceful means. The impetus for unions to live up to inter-union agreements rests on reinforcing considerations of honor, reciprocity, mutuality—and enforceability. The winning union may bring an action, either in federal court under § 301 of the Taft-Hartley Act or in state court, to secure injunctive relief against a union that has failed to abide by its agreement to honor the Joint Board decision and renounce the work.[24] While delay may be involved before the union can secure an adjustment in fact, e.g., by prevailing in its suit for enforcement of the arbitration agreement, the public interest is safeguarded in the interim by the injunction obtained under § 10(*l*). That injunction remains in effect pending the ultimate adjustment, and may, indeed, give the winning union incentive to pursue with diligence legal enforcement of an award in its favor. Problems may arise in fact under this procedure if the employer tempts the losing union with continued offers of the work in dispute, but to give the losing union a legal right to another bite at the apple in the 10(k) proceeding is only to permit the jurisdictional battle to begin anew as a matter of right and principle, whereas a central objective of § 10(k) is to strengthen enforcement of agreements reached by the unions.

The construction of § 10(k) approved today means that proceedings on 8(b)(4)(D) unfair labor practices charges may be terminated because of union agreements reached

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[24] Additional avenues to enforcement are provided by the Joint Board itself. The Joint Board's procedural Rules and Regulations set out compliance procedures which provide, *inter alia*, that when a union is declared to be in noncompliance, no job decisions shall be issued in favor of that trade pending compliance.

after the proceedings are begun. But that is precisely the purpose of § 10(k) as expressed in *CBS*, where the Court said (364 U.S. at 576-77):

> Section 10(k) . . . quite plainly emphasizes the belief of Congress that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions.

It also means that proceedings may be dismissed although an employer is dissatisfied with, and would prefer to contest and litigate, the agreement reached by the unions. The special provisions were passed, however, to protect the employer who was "neutral" in the dispute.

Special Provisions of § 10(k) Inapplicable to Employers Not Truly Neutral in Jurisdictional Dispute

An employer properly has standing under these provisions when he is plagued by employee groups that do not agree, and not when he is dissatisfied with the way they do agree. This principle has indeed been recognized by the Board so-called Safeway doctrine in cases where an unfair labor practice violation has been followed by actual agreement between unions, with renunciation of the work.[25] In those cases the Board agrees that there is no longer a jurisdictional dispute.

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[25] Highway Truckdrivers & Helpers, Local 107, Int'l Bhd of Teamsters (Safeway Stores, Inc.), 134 NLRB 1320 (1961); Local 1905, Carpet Linoleum & Soft Tile Layers (Butcher and Sweeney Constr. Co.), 143 NLRB 251 (1963).

In Quinn v. NLRB (Don Cartage Co.) 61 LRRM 2690 (1966) this court remanded a Board disposition of a 10(k) proceeding made on the basis of a decision by one union renouncing the particular work. This was *not* accepted as a settlement of the dispute by the other union. The Board decided that the dispute before it in the 10(k) proceeding should be limited to the particular work, leaving the broader dispute for reference to the new Joint Board established in 1965, which heightened provision for employer participation and attention to employer interests (*see* note 27, *infra*). That 1965 procedure to settle the broad dispute was

The essential point is that the employer's economic interests do not require the Board to pursue the matter under § 10(k) even though (a) there was an unfair labor practice under § 8(b)(4)(D) in the first instance and (b) the employer is not really neutral as between the unions but makes it clear that he is dissatisfied with the adjustment on which they have agreed. The same principle is fairly operative when the unions have agreed on a method for obtaining an adjustment, a binding arbitration that the unions will generally observe and have power to enforce.

The Taft-Hartley Act, though broad and unqualified in its terms, must be taken in light of its dominant purpose to protect "neutral" employers. This aspect of the "common law" of labor relations has been infused into the meaning of the Act in cases involving the provisions of the law broadly prohibiting secondary boycotts.[26] A similar principle is also applicable to ensure the kind of application of the jurisdictional dispute provisions that was intended by Congress.

We need not consider whether in some other case the Board could continue with a § 10(k) proceeding because the rival employee groups had not reached an actual agreement and their agreement on a procedure for adjustment was subject to an infirmity that undercut its fairness and reliability as a method of achieving the industrial peace

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established more than 10 days after the charge was filed in 1964, and hence, under the terms of § 10(k), came too late to be a mandatory procedure even if the 10(k) proceeding was viewed as extending to the broad dispute. This court held that the 10(k) dispute involved in that case was a broad dispute—the case having taken shape, by agreement of all parties, including the Board's General Counsel, as relating to the broad, continuing dispute, and a long proceeding, with full evidence, had been held on the issue given this scope. All that was involved was a ruling that on the facts of that case the Board had abused its discretion in endeavoring to narrow the dispute awaiting its determination.

[26] Woodwork Mfg. v. NLRB, 386 U.S. 612, 625; International Bhd. of Elec. Workers v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950), *aff'd.*, 341 U.S. 694 (1951).

that is the ultimate objective of Congress.[27] It may also be that the Board has discretion to conclude that a paper agreement between disputing unions does not in fact reflect an operative mechanism likely to resolve the dispute. No such contention has been advanced by the Board either as to the general operation of the Joint Board plan or as to its handling of this particular inter-union dispute. Under these circumstances we hold that the presently operative Joint Board plan which creates in the unions not entitled to disputed work a legally enforceable obligation to renounce the work can be and was intended by Congress to be preserved as a private-ordering mechanism for the resolution of jurisdictional disputes. We conclude that § 10(k) was intended to give full play to this private-ordering mechanism, and requires the Board to abstain from adjudication while it is being pursued.[28]

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[27] Thus, we need not consider the efficacy for purposes of § 10(k) of an inter-union proceeding that made no realistic provision for meaningful attention to the interest of the employer and to questions of efficiency. In the case before us we have a Joint Board of employers and employees and one that was specifically organized and maintained for the purpose of coping with the requirements of the Taft-Hartley Act and the need for the effective resolution of jurisdictional disputes. It is a Board that takes into account factors of economy and efficiency of operation. The construction industry is typically beset by conflicts in which a group of employees and their employers (sometimes, of course, subcontractors) are likely to be aligned with each other as against another alignment of a different group of employees and their employers.

[28] We do not determine whether the rule of this decision should be retroactive to prior 10(k) determinations in cases other than the one before us. The Supreme Court has in various instances given only prospective effect to rulings that upset a previous course of decision. See Desist v. United States, 394 U.S. 244 (1969), and cases there cited. In some cases our court, in overturning a long-standing administrative construction of a statute, has held that the balance of public interest is best served by withholding completely retroactive effect to our ruling. Blair v. Freeman, 125 U.S.App.D.C. 207, 370 F.2d 229 (1966). Certainly our ruling would be applicable to any subsequent 10(k) decision, for the Board would be on notice of the infirmity. See Zuber v. Allen, 396 U.S. 168, 197 (1969). As to the applicability of our ruling to decisions previously issued by

Our understanding of the thrust of Federal labor policy as developed by Congress proceeds along lines congruous to those developed by the Supreme Court in *Boys Markets, Inc.* v. *Retail Clerks, supra.* There the Court reversed a ruling of but nine years standing in order to maintain the efficacy of the arbitration remedy—viewed in the large as furthered by an injunction preserving the status quo pending the arbitral process. The Court stressed the importance of mutuality—that an employer could not be held to his contract to pursue the arbitration remedy if he could not obtain effective relief (including pendente lite injunction) to enforce the union's similar obligation. Our situation is marked by technical differences but similarity in principles. As we have noted, Board abstention under § 10(k) in favor of an arbitration agreement is accompanied by injunctive relief to maintain the status quo pending the conducting of the arbitration and the enforcement of the award. And the pattern we find in the Act avoids a lack of mutuality since the employer cannot interfere with arbitration on the ground that he desires to permit the Board to conduct a proceeding and issue an order that he is not obligated to observe.

Accordingly the petition to review is granted; the petition for enforcement is denied; and the Board's order of June 27, 1968, 172 NLRB No. 77 is set aside.

So ordered

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the Board, we do not clearly discern the possible shape of the problem, and therefore we defer decision on what course will best effectuate the Federal labor policy contemplated by Congress.

MACKINNON, *Circuit Judge*, dissenting: Since its amendment over twenty years ago, the decisions of the National Labor Relations Board [1] (NLRB) and the federal courts [2] have assumed that the National Labor Rela-

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[1] United Brotherhood of Carpenters, etc., Local 581 (Ora Collard), 98 NLRB 346, 348-349 (1952); Int'l Union of Operating Engineers (Empire State Painting Co.), 99 NLRB 1481, 1484-1486 (1952); International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Pittsburgh Plate Glass Co.), 125 NLRB 1035, 1038-1039 (1959); United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, 108 NLRB 186, 197 (1954); Millwrights Local 1102, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (General Riggers and Erectors, Inc.), 127 NLRB 26, 29 (1960); Newspaper and Mail Delivers' Union (News Syndicate Co.), 141 NLRB 578, 580 (1963); International Union of Operating Engineers, Local 66 (Frank P. Badolato & Son), 135 NLRB 1392, 1395-1396 (1962); Local 173, Wood, Wire and Metal Lathers' International Union, AFL-CIO (Newark and Essex Plastering Co.), 121 NLRB 1094, 1103-1104 (1958); Bay Counties District Council of Carpenters, Inc., 115 NLRB 1757, 1766-1767 (1956); Local 450, International Union of Operating Engineers (Sline Industrial Painters), 119 NLRB 1725, 1731 (1958), enforced, 275 F.2d 408 (5th Cir. 1960); Local 825, Int'l Union of Operating Engineers (Nichols Electric), 137 NLRB 1425, 1428-1429 (1962), enforced, 326 F.2d 213 (3d Cir. 1964); Local 964, United Brotherhood of Carpenters (Carleton Bros.), 141 NLRB 1138, 1142 (1963); Local 68, Wood, Wire & Metal Lathers, etc. (Acoustics & Specialties, Inc.), 142 NLRB 1073, 1076 (1963); Local 825, Int'l Union of Operating Engineers (Schwerman Co. of Pa., Inc.), 139 NLRB 1426, 1429 (1962); Carpenters District Council of Denver Inc. (J. O. Veteto & Son), 146 NLRB 1242, 1245 (1964); Electrical Workers, Local 26, etc. (McCloskey & Co.), 147 NLRB 1498, 1501-1503 (1964); Carpenters Local Union No. 1622 (O. R. Karst), 139 NLRB 591, 594 (1962); Operative Plasterers Local No. 65 (Twin City Tile & Marble Co.), 152 NLRB 1609 (1965); Local 300, United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (D. Annunzio Bros., Inc.), 155 NLRB 836 (1965).

[2] *See* New Orleans Typographical Union No. 17 v. N.L.R.B., 368 F.2d 755, 763 (5th Cir. 1966); N.L.R.B. v. Local 825, International Union of Operating Engineers, AFL-CIO (Nichols Electric Co), 326 F.2d 213, 216 (3rd Cir. 1964); Local 450, International Union of Operating Engineers, AFL-CIO (Sline Industrial Painters) v. Elliott, 256 F.2d 630, 636 (5th Cir. 1958). *See also* Carey v. *Westinghouse Electric Corp.*, 375 U.S. 261, 264 (1963), citing Wood, Wire & Metal Lathers Union, 119 NLRB 1345, 1347 (1958).

tions Act requires both the employer and the unions charged with committing an unfair labor practice under section 8(b)(4)(D) [3] to agree to be bound by an arbitration before the NLRB may be divested by section 10(k) [4] of jurisdiction to hear and decide the issue.

The majority opinion here would reverse all these administrative and court decisions and hold that the NLRB has no jurisdiction to decide such disputes where the two

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[3] The unfair labor practice is defined by § 8(b)(4)(D) which provides:

> It shall be an unfair labor practice for a labor organization or its agents—
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> * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting Commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case in object thereof is—
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> * * * *
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. 29 U.S.C. § 158(b)(4)(D).

[4] Section 10(k) provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed. 29 U.S.C. § 160(k).

unions involved are members of the AFL Building and Construction Trades Department if both have agreed to be bound by the decisions of the National Joint Board for the Settlement of Jurisdictional Disputes (Joint Board) [5] established by that labor organization.

In this case the NLRB found that the Plasterers Union committed an unfair labor practice under section 8(b) (4) (D), but the majority opinion would sustain the Plasterers' claim that the NLRB was without jurisdiction to hear and determine the dispute because the two unions (Plasterers and Tile Setters) had agreed upon a voluntary method of adjusting the dispute notwithstanding the fact that the employers had not agreed to be bound by such decision. The principal contention of the Plasterers, which is sustained by the majority opinion, is that the employers' consent to be bound by such decision is not required under section 10(k).

The NLRB contends the employers are parties to the dispute and since it is admitted that they have not agreed to be bound by the Joint Board determination of the dispute between the two unions that the NLRB is empowered and directed to make a binding determination of the dispute that will be controlling upon all the parties. The majority opinion bases its decision upon (1) alleged legislative history and (2) a single sentence in a 1961 Supreme Court decision. Both of these grounds have a similar cast to them as both involve isolated comments addressed to describing the garden variety of jurisdictional disputes and neither were in any way addressed to the problem that is before the court here of the NLRB's power and duty to adjudicate unfair labor practices caused by jurisdictional strikes in violation of section 8 (b) (4) (D). See section 10(a).

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[5] This board was created pursuant to an agreement of October 17, 1949 by the Building and Construction Trades Department of the AFL, the Participating Specialty Contractors Employers' Association and the Associated General Contractors of America, Inc. *See* 53 GEO. L.J. 130 n.198 (1964).

In asserting reliance on the legislative history, petitioner cites the article in 52 GEORGETOWN LAW JOURNAL 314 by counsel in this case. This article published in 1964 favored the Joint Board approach to jurisdictional disputes and it has spawned several later articles that adopt the same thesis that somehow the legislative history of section 10(k) supports the position here asserted on behalf of the Joint Board. The majority opinion adopts this argument. The feature of the "legislative history" that is relied upon to bring about this result is stated in the GEORGETOWN LAW JOURNAL article to be:

> Certainly, the literal meaning of section 10(k) does not require the employer to be a party to a settlement of a jurisdictional dispute,[6] and *the legislative history of the Act makes no mention whatsoever of employer's participation in private settlements under section 10(k)*. 52 GEO. L.J. 314, 332 (1964) (emphasis added).

In support of the italicized statement the article in a footnote cites five instances when Senators and Congressmen discussed jurisdictional disputes or strikes and did not mention employers' participation in private settlements un-

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[6] Actually, the literal meaning of § 10(k) deals only with jurisdictional strikes against an employer and does not concern itself with jurisdictional disputes between unions. So long as jurisdictional disputes are confined to unions the NLRB has no jurisdiction under § 10(k). It is only when an unfair labor practice involves an employer through a jurisdictional strike that the NLRB has any jurisdiction. *See* Justice Douglas' opinion in Carey v. Westinghouse Corp., *supra*, 375 U.S. at 263-264. Senator Taft made this same point on June 21, 1947 in a radio address. He was addressing himself to the handling of jurisdictional disputes under § 10(k) after that section had attained its present form. He said:

> The President says the bill would force unions to strike if they wish to have a jurisdictional dispute settled by the National Labor Relations Board. This is not so. All the union has to do is to file a petition under the representation section. *How could this provision increase strikes when it is not effective at all until there is already a jurisdictional strike or secondary boycott in effect?* (Emphasis added). 2 *Legislative History Labor Management Relations Act* 1947, p. 1627.

der section 10(k). There is nothing exceptional about this and it has absolutely no bearing on the issue here. The fact that Congress did not discuss employer participation does not in any way indicate any congressional intent on the matter. The members of Congress just did not address themselves to the point. In addition, there is a very good reason they did not address themselves to the point and that was because at the time four of the five remarks were made, section 10(k) was not in its present form. The bill originated in the House and at that stage it merely defined jurisdictional strikes and made them unlawful. Section 10(k) was not then in the bill. This treatment of jurisdictional strikes was supplanted in the Senate bill by a section 10(k) the principal provision of which empowered and authorized the NLRB to appoint an arbitrator to hear and determine such disputes. This provision for the NLRB appointment of an arbitrator was removed in the Conference Committee and section 10(k) then for the first time assumed its present character. Thus, the failure of the five members of Congress to discuss 10(k) in its present form is explained by the fact that the bill did not reach its present form until after their quoted remarks. While the 10-day provision was always a part of 10(k) from the time it emerged in the Senate bill at attracted no notice because it was always overshadowed by the provision for the Board to appoint an arbitrator.

This explains why the members of Congress in four out of five instances cited did not even consider the issue we have here.[7]

However, Senator Morse did discuss section 10(k) after it had achieved its present form and he interpreted the provision as requiring the NLRB to decide jurisdictional disputes. Speaking on the Senate floor on June 4, 1947 on the bill as reported by the House and Senate Conferees, Senator Morse said:

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[7] *See Legislative History Labor Management Relations Act* 1947, Representative Hartley 615, Senator Morse 950, Senator Taft 1012, Senator Murray 1046, Senator Smith 1157.

> I am especially disturbed about the amendment made in conference *which requires the Board itself*, rather than an arbitrator, *to decide these jurisdictional disputes.* I think the provision is completely unworkable. Under the provision *the Board will have to hear and decide the merits of the disputes* in the motion-picture industry and the controversy of over 50 years' standing between the teamsters and brewery workers unions, to mention only a few.[8] (Emphasis added). 2 *Legislative History of the Labor Management Relations Act*, 1947, p. 1554.

So the "legislative history" relied upon by the petitioner is not helpful and to the extent that the remarks of Senator Morse on June 5, 1947 may be considered to be in this category, they are adverse to petitioners. The truth of the matter is that the legislative history of section 10(k) does not afford any substantial assistance to its interpretation and the weakness of the majority opinion is demonstrated by its assertion that it does.

The Supreme Court decision is *NLRB* v. *Radio and Television Broadcast Engineers Union* [*CBS*], 364 U.S. 573 (1961), and the single sentence in that opinion which the majority opinion here relies upon comments upon a clause in section 10(k), as follows:

> [T]he clause "the dispute out of which such unfair labor practice shall have arisen" can have no other meaning except a jurisdictional dispute under § 8(b)(4)(D) which is a dispute between two or more groups of employees over which is entitled to do certain work for an employer. 364 U.S. at 579.

Since neither the legislative history nor this sentence in the CBS decision addressed the problem here being considered, neither furnish any support for the conclusion reached by the majority opinion. The comments quoted in

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[8] He did not address himself to the problem which arises under the Joint Board here. *See* note 5 *supra.*

the legislative history and in *CBS* are correct as far as they go, but they do not touch the issue here. They are merely comments taken out of context and misapplied.

Another feature of the majority opinion that obscures the issue is its overemphasis on the "jurisdictional dispute" here involved and its underemphasis on the fact that the dispute had ripened into a jurisdictional strike against an employer and that based upon such conduct, unfair labor practice charges had been filed with the NLRB.

No person needs any support for the proposition that the most ordinary union jurisdictional dispute primarily involves the unions concerned but that conclusion does not support the finding that the employer is not a very vital party to a jurisdictional strike arising out of that underlying dispute and which subsequently becomes the subject of an unfair labor practice charge. The unions by their actions have made him a party to their dispute and the statute recognizes this fact. Also, the fact that the Joint Board has employer groups in its structure, indicates that employers do have a direct interest in their decisions.

The words "such dispute" in section 10(k) *refer to the dispute out of which the unfair labor practice arose* and the statute provides that is the jurisdictional *strike* in which the striking union attempts to force the employer to assign particular work to employees in its union. There is no question that the employer is a party to that dispute. In fact, an employer is a necessary party to any dispute involving an unfair labor practice under section 8(b)(4)(D) by its very definition. Clearly the unfair labor practice arises out of the *strike*. More remotely the jurisdictional strike in many cases arises out of the jurisdictional *dispute*[9] but no unfair labor practice charge under section 8(b)(4)(D) ever arose solely out of a jurisdictional dispute between two unions. It requires "a strike" that involves an employer as one party.

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[9] This more remote dispute was what Justice Black was referring to in the *CBS* case, *supra* at 579.

Moreover, there are several interesting references to the interests of employers in jurisdictional disputes. The article in 52 GEORGETOWN LAW JOURNAL 314 on Jurisdictional Disputes cited in the majority opinion recognizes at pp. 320-21 that ". . . an employer is not necessarily a neutral party unconcerned with which group performs the work . . . ." Also, in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261 (1964), Justice Douglas discusses jurisdictional disputes and points out several ways in which they may involve employers:

> We have here a so-called "jurisdictional" dispute involving two unions *and* the employer. But the term "jurisdictional" is not a word of a single meaning. In the setting of the present case this "jurisdictional" dispute could be one of two different, though related, species: either—(1) a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another; or (2) a controversy as to which union should represent the employees doing particular work. If this controversy is considered to be the former, *the National Labor Relations Act* (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 *et seq.*) *does not purport to cover all phases and stages of it.* While § 8(b)(4)(D) makes it an unfair labor practice for a union to strike to get an employer to assign work to a particular group of employees rather than to another, *the Act does not deal with the controversy anterior to a strike nor provide any machinery for resolving such a dispute absent a strike.*
>
> * * * *
>
> The Act and its remedies for "jurisdictional" controversies of that nature come into play only by a strike or a threat of a strike. *Such conduct gives the Board authority under § 10(k) to resolve the dispute.* 375 U.S. at 263-264. (Emphasis added).

I find Justice Douglas' approach to this portion of the Act to be more reasonable than the finespun theory advanced

in the majority opinion. After all, we are here faced with what all admit is an unfair labor practice that has been committed in violation of section 8(b)(4)(D). In such circumstances, section 10(k) should be read in conjunction with section 10(a) which provides:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. *This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise* . . . . (Emphasis added). 29 U.S.C. § 160(a).

In carrying out the various duties imposed upon it by Congress the NLRB has followed a policy for twenty years which favors and encourages the unions to settle their own differences by themselves. Even when a union starts a jurisdictional strike in violation of section 8(b)(4)(D), the NLRB will quash the proceedings under 10(k) if either union renounces any claim to the work.[10] It is only when the dispute is protracted that the NLRB carries out the regular hearing as directed by section 10(k).[11] This is a recognition of the changed status of the dispute which occurs when one or both unions enlarge the dispute between themselves to include the employer by engaging in a strike against that employer in an attempt to obtain an advantage over their rival union.[12]

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[10] *See* Local 1905, Carpet, Linoleum & Soft Tile Layers (Southwestern Floor Co.), 143 NLRB 251, 255-256 n.7 (1963).

[11] This is the representation in the NLRB brief as to agency policy.

[12] In New Orleans Typographical Union No. 17 v. N.L.R.B., 368 F.2d 755, 767 (5th Cir. 1966), the court remarked:

> When the Union struck to enforce the work assignment it removed the controversy from the field of private contractual rights into the higher ambit of public rights.

It also made the employer a party to the dispute.

Such procedure by the NLRB must be considered to be a sound interpretation and application of the powers conferred upon it by the Act. The sound discretion they exercise in such matters also finds support in that provision of section 10(k) which requires the parties to

> ". . . submit to the Board *satisfactory evidence* that they have adjusted, or agreed upon methods for the voluntary *adjustment* of, the dispute. . . ." (Emphasis added).

"Satisfactory evidence . . . [of] adjustment" to whom? Obviously to the NLRB. This vests the NLRB with discretion in the matter. This discretion is weighed against the overriding duty imposed on the NLRB to prevent any unfair labor practice and to exercise that power unaffected "by any other means of adjustment." § 10(a). This places a heavy responsibility upon the NLRB in a section 8(b)(4)(D) proceeding to determine that the settlement procedure is going to be effective to adjust the unfair labor practice (not just the jurisdictional dispute) before it discusses the charge. I thus find the majority opinion that strikes at the heart of this procedure to be an unreasonable interpretation of the Act and find much more reasonable the 20-year administrative interpretation that has been placed by the Board upon these sections of the Act.

The Board's interpretation of its duties in these jurisdictional disputes has been regularly reported to Congress [13] and Congress has left section 10(k) unchanged even though it has made extensive revisions of the Act since 1947. It amended both sections (j) and (*l*) as well as 8(b)(4)(D) in 1959. Under such circumstances Congress is deemed to have accepted the construction placed

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[13] *See, e.g.*, Twentieth Annual Report of the National Labor Relations Board (G.P.O., 1956), p. 118; Twenty-first Annual Report of the National Labor Relations Board (G.P.O., 1957), p. 119; Twenty-third Annual Report of the National Labor Relations Board (G.P.O., 1959), pp. 101-102.

on section 10(k) by the Board [14] and under such circumstances it is well settled that the contemporaneous construction of the statute by the agency charged with its administration and enforcement should be sustained.[15] I according dissent from the majority opinion that would overturn long-standing Board practices.

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[14] Labor Board v. Gullet Gin Co., 340 U.S. 361, 366 (1951). Such interpretation does not assign conclusive weight to congressional inaction. (*See* Boys Markets, Inc. v. Retail Clerk's Union, —— U.S. —— (June 1, 1970), cited by the majority opinion at page 21). It merely points to the failure or refusal of Congress to amend this section when it was amending subsections on both sides of it as one factor in conjunction with the contemporaneous construction of the Act by the NLRB over 23 years, the provisions of the Act itself including section 10(a) and Mr. Justice Douglas' opinion in Carey v. Westinghouse Corp., *supra*, wherein he points out that "there is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award," as pointing to a conclusion that the Act is not to be construed in the manner the majority opinion states. These are all indicia of congressional intent and that is the principle here relied upon; not *stare decisis* as in Boys Markets, Inc.

[15] Udall v. Tallman, 380 U.S. 1, 16-17 (1965); F.T.C. v. Mandel Bros., Inc., 359 U.S. 385, 391 (1959); NLRB v. Coca-Cola Bottling Co., 350 U.S. 264, 269 (1956); Commissioner v. Estate of Sternberger, 348 U.S. 187, 199 (1955); United States v. Public Utilities Commission of California, 345 U.S. 295, 314-315 (1953); Union Mfg. Co. v. NLRB, 95 U.S.App.D.C. 252, 221 F.2d 532, 536, *cert. denied*, 349 U.S. 921 (1955), and cases there cited; West Texas Utilities Co. v. NLRB, 87 U.S.App.D.C. 179, 181, 184 F.2d 233, 235 (1950), *cert. denied*, 341 U.S. 939 (1951).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1969

No. 22,073

(United States Court of Appeals for the District of Columbia Circuit Filed Jun 30, 1970
Nathan J. Paulson, Clerk)

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

TEXAS STATE TILE & TERRAZZO CO., INC., ET AL., AND LOCAL UNION 20 BRICKLAYERS, ETC., LOCAL UNION 108 INT'L ASSOC. OF MARBLE, ETC., POLISHERS, ET AL., INTERVENORS

On Petition to Review and on Cross-Petition to Enforce an Order of the National Labor Relations Board

Before: McGowan, Leventhal and MacKinnon, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Natitonal Labor Relations Board, and was argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the petition for review is hereby granted; the petition to enforce is denied; and the order of the National Labor Relations Board on review herein (172 NLRB No. 77, June 27, 1968) is hereby set aside.

Per Curiam

For the Court:

NATHAN J. PAULSON, Clerk

By:

Hugh E. Kline
Chief Deputy Clerk

Dated: June 30, 1970.

Opinion per Circuit Judge Leventhal.
Separate dissenting opinion by Circuit Judge MacKinnon.

A true copy:

Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
for the District of Columbia Circuit.

By: Dorothy E. Long, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1970

No. 22,073

(United States Court of Appeals for the District of Columbia Circuit Filed Oct. 1, 1970
Nathan J. Paulson, Clerk)

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

TEXAS STATE TILE & TERRAZZO CO., INC., ET AL., AND LOCAL UNION 20 BRICKLAYERS, ETC., LOCAL UNION 108 INT'L ASSOC. OF MARBLE, ETC., POLISHERS, ET AL., INTERVENORS

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges; in Chambers.

ORDER

On consideration of respondent's petition for rehearing and suggestion for rehearing *en banc* and of intervenor's petition for rehearing and suggestion for rehearing *en banc*, and it appearing that there is not a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED by the Court that the aforesaid petitions for rehearing and suggestions for rehearing *en banc* are denied.

Per Curiam

A true copy:

Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
for the District of Columbia Circuit.

By: Elisabeth E. Namuth, Deputy Clerk

Circuit Judge Wright did not participate in the foregoing order.

Circuit Judge MacKinnon would grant the respondent's and intervenor's suggestions for rehearing *en banc* for the reasons set forth in his dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 1184, October Term, 1970

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PLASTERERS' LOCAL UNION NO. 79, ETC., ET AL.

ORDER ALLOWING CERTIORARI—filed March 22, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

The case is consolidated with No. 1231 and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 1231, October Term, 1970

TEXAS STATE TILE & TERRAZZO CO., INC., ET AL., PETITIONERS

v.

PLASTERERS' LOCAL UNION NO. 79, ETC., ET AL.

ORDER ALLOWING CERTIORARI—filed March 22, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

The case is consolidated with No. 1184 and a total of one hour is allotted for oral argument.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, *et al.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit denying enforcement of the Board's order.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 21-63) is not yet officially reported. The decision and order of the Board in the unfair labor practice proceeding (App. C, *infra*, pp. 68-80) are reported

at 172 NLRB No. 77. The Board's earlier decision and determination of dispute (App. D, *infra*, pp. 81-94) are reported at 167 NLRB 185.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 64-65) was entered on June 30, 1970. The Board's timely petition for rehearing *en banc* was denied on October 1, 1970 (App. B, *infra*, pp. 66-67). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board has power to determine a jurisdictional dispute under Section 10(k) of the National Labor Relations Act where the competing unions have agreed upon a voluntary method of adjustment, but the employer involved has not consented to be bound by that procedure.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * *
>
> 4(i) to engage in, or to induce or encourage any individual employed by any person * * * to engage in, a strike or a refusal in the course of

his employment to * * * work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person * * * where in either case an object thereof is:

* * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

* * * *

Sec. 10. * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

STATEMENT

A. The Underlying Disputes

This case involves picketing by the Plasterers Union ("Plasterers")[1] directed against two different employers—Texas State Tile & Terrazo Company ("Texas State") and Martini Tile and Terrazo Company ("Martini")—in furtherance of its demand that the work of applying a coat of Portland cement mortar to walls upon which tile was to be installed should be assigned to employees represented by Plasterers rather than to employees represented by the Tile Setters Union ("Tile Setters").[2]

1. *The Anderson library job*

In 1965, Southwestern Construction Company ("Southwestern"), a general contractor, entered into a contract with the University of Houston to construct an addition to the University's library. The tile and terrazzo work was subcontracted to Texas State, which commenced work in August 1966. (App. D, pp. 83-84; A. 29-30, 38.)[3] Texas State assigned the tile work to employees represented by Tile Setters, the union with which it had a collective bargaining agreement (App. D, p. 84; A. 42, 47, 61). This work, which

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[1] Plasterers' Local Union No. 79, Operative Plasterers' and Cement Masons' International Association, AFL-CIO.

[2] Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America, AFL-CIO.

[3] "A." refers to the portion of the record printed as an appendix to the briefs in the court below.

occurred after employees represented by Plasterers had applied a thin scratch coat of cement over the metal lath, consisted of applying a second coat of Portland cement mortar and then tile to the stairwells and the walls of the restrooms of the eight story library building. (App. D, p. 85; A. 31-32, 38-39, 49-50, 150-151.)

During the fall of 1966, Plasterers advised Tile Setters that the application of the second coat was the work of Plasterers (App. D, p. 84; A. 49, 51-52, 54).[4] Tile Setters rejected this claim, and Plasterers submitted the matter to the National Joint Board for the Settlement of Jurisdictional Disputes ("Joint Board"), a tribunal established by the Building Trades Department, AFL-CIO (App. D, p. 84; A. 54-55). Both unions are bound by decisions of the Joint Board by virtue of their affiliation with constituent International Unions of the Building Trades Department; however, neither Texas State, the employer who assigned the disputed work, nor the local or national contractors' associations to which it belonged, had agreed to be bound by the procedures of the Joint Board (App. C, p. 74; App. D, pp. 84, 88).

The competing unions presented their respective positions to the Joint Board, but Texas State informed the Joint Board that it did not wish to submit the dispute to it (A. 406-410). On November 10, 1966, the Joint Board awarded the disputed work—which it characterized as "the plumbing, rodding, and squaring of walls which are to receive tile"—to Plasterers.

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[4] The disputed coat is called the "float coat" or "setting bed" by Tile Setters, and the "brown coat" by Plasterers (App. D, p. 85; A. 51-52).

Thereafter, Plasterers made several attempts to obtain the work, but Texas State refused to accede to its demands, and assigned the work to Tile Setters (App. C, p. 72; App. D, p. 84; A. 55-56, 415).

On January 24, 1967, Plasterers commenced picketing at the jobsite to force Texas State to assign the disputed work to employees whom it represented (App. C, pp. 72-73; A. 44, 45). All crafts working on the job honored the picket line, causing a complete work stoppage (App. C, p. 72; A. 33, 34, 47). The picketing ceased after the United States District Court for the Southern District of Texas, upon application of the Board's Regional Director, issued an injunction pursuant to Section 10(l) of the Act (29 U.S.C. 160(l)) (App. C, p. 72; A. 28-29).

2. *The Rainbo Bakery job*

Martini entered into a direct contract with Rainbo Baking Company to remodel a panning room at Rainbo's bakery in Houston, Texas (App. D, p. 85; A. 57, 99, 109). Martini began work on March 15, 1967 (App. D, p. 85). It assigned the work, which involved the direct application of a coat of Portland cement mortar to metal lath laid over painted brick, to Tile Setters, with whom Martini had a collective bargaining agreement (App. D, pp. 85, 86; A. 57, 58-59, 99, 109-110). On March 17, 1967, Plasterers picketed the jobsite in order to force Martini to assign the disputed work to employees whom it represented (App. C, p. 73; App. D, p. 88; A. 57, 439). At Rainbo's request, Martini removed its employees from the job and the picketing ceased (App. D, p. 85; A. 59-60,

98-99). Thereafter, Martini returned and completed the job without further incident (App. D, p. 85; A. 57-58). Plasterers did not submit the dispute to the Joint Board (App. D, p. 86). Neither Martini nor any of the associations to which it belonged were bound by the procedures of the Joint Board (App. D, p. 88; A. 57, 128).

B. The Proceedings Before the National Labor Relations Board

1. *The Section 10(k) proceeding*

Meanwhile, Southwestern and Martini filed unfair labor practice charges with the National Labor Relations Board, alleging that Plasterers' picketing and related conduct violated Section 8(b)(4)(D) of the Act (App. C, *infra*, pp. 68-69). The Board's Regional Director found reasonable cause to believe that the charges had merit and, pursuant to Section 10(k) of the Act, issued a notice of hearing to determine the dispute out of which the alleged violation arose. In April 1967 a hearing was held before a hearing officer of the Board, at which the competing unions and the employers involved—Southwestern, Texas State, and Martini—presented evidence and argument in support of their respective positions (App. D, pp. 81-82).

On August 22, 1967, the Board issued its decision and determination of dispute. After weighing all the relevant factors presented, including the action of the Joint Board, it concluded with respect to both projects that employees represented by Tile Setters, rather than those represented by Plasterers, were entitled to

perform the work of applying to walls a coat of Portland cement mortar upon which tile was to be installed. (App. D, pp. 92-94).[5] The Board rejected Plasterers' contention that the notice of hearing should be quashed because the disputing unions had agreed upon a method for voluntary settlement, applying its long standing principle that the Board is obligated to determine the dispute under Section 10 (k) unless all parties to the dispute, including the employers assigning the work, have assented to the voluntary method (App. D, p. 88, n. 3). The Board directed Plasterers to notify the Regional Director within 10 days whether it would comply with the Board's determination of the disputes (App. D, p. 94).

2. *The unfair labor practice proceeding*

When Plasterers refused to comply with the Board's determination of the work disputes, the General Counsel of the Board issued a complaint upon the 8(b)(4)(D) unfair labor practice charges (*supra*, p. 7), which had been held in abeyance in the hope that the 10(k) determination would obviate the need for deciding those issues (App. C, p. 70; A. 440; 29 C.F.R. 102.90, 102.91). The parties waived a hearing before a Trial Examiner and agreed to submit the mat-

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[5] The Board considered the collective bargaining agreements among the parties; employer, area, and industry practice; relative skills and efficiency of operation; agreements between Plasterers and Tile Setters; and, as noted above, the Joint Board award. The Board declined to accord controlling weight to that award "[i]n view of all the circumstances, including its ambiguous nature" (App. D, pp. 89-93).

ter directly to the Board. The parties further agreed to make the record in the Section 10(k) proceeding a part of the unfair labor practice proceeding. (App. C, pp. 69-70; A. 442-443).

Upon the entire record, the Board concluded that Plasterers had violated Section 8(b)(4)(D) of the Act by picketing the Anderson and Rainbo jobs in order to force Texas State and Martini to assign the disputed work to employees represented by Plasterers rather than employees represented by Tile Setters (App. C, pp. 75, 76). The Board ordered Plasterers to cease and desist from such activity, to post appropriate notices and to notify the Regional Director what steps had been taken to comply with the order (App. C, pp. 77-78). The Board again rejected Plasterers' contention that the Board was precluded from hearing and determining the dispute under Section 10(k) because the competing unions had agreed upon a voluntary method of adjustment (App. C, pp. 74-75).

C. The Decision of the Court of Appeals

The court of appeals (Judges Leventhal and McGowan, with Judge MacKinnon dissenting) denied enforcement of the Board's order (App. A, pp. 21-63). The court recognized that Section 10(k) commands the Board to abstain from hearing and determining a work dispute when "the parties to such dispute" have either adjusted the dispute or agreed upon a method for adjustment. It concluded, however, that "[i]t is not the employer but the rival unions (or other employee groups) who are parties to the juris-

dictional dispute contesting which employees are entitled to seek the work in question" (App. A, p. 33). Accordingly, the court held that "the Board may not properly proceed to determine a jurisdictional dispute pursuant to § 10(k) when the disputing unions have agreed to settle their dispute through binding arbitration" (App. A, p. 24).[6]

REASONS FOR GRANTING THE WRIT

The holding of the court of appeals—that the Board is deprived of power to hear and determine a jurisdictional dispute under Section 10(k) when the competing unions, but not the employer who has made the disputed work assignment, have agreed upon a voluntary method for the resolution of the dispute—is contrary to the interpretation which the Board consistently has given Section 10(k) since its enactment over 23 years ago and which the courts of appeals heretofore have approved. The issue is of manifest importance in the administration of the Act, and the decision below, if allowed to stand, is bound to have an unsettling effect on labor relations in important segments of the economy, and particularly in the construction industry.

1.a. Section 8(b)(4)(D) of the Act makes it an unfair labor practice for a labor organization to exert strike pressure for the purpose of forcing "any em-

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[6] Although the Rainbo Bakery dispute was not submitted to the Joint Board, the court of appeals nevertheless held that, because the two unions had agreed to be bound by the procedures of the Joint Board, the National Labor Relations Board was precluded from hearing and determining the dispute under 10(k).

ployer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class * * *." If such a charge is filed and deemed substantial, the Act, instead of providing for the immediate institution of an unfair labor practice proceeding, as it does for other unfair labor practice charges (Section 10(b), 29 U.S.C. 160(b)), suspends further action on the 8(b)(4)(D) charge pending an effort to resolve the jurisdictional dispute which gave rise to the unfair labor practice conduct. Thus, Section 10(k) provides that

> the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute * * *

As Judge Mackinnon pointed out in dissent (App. A, pp. 58-59, emphasis in original), the "words 'such dispute' in section 10(k) *refer to the dispute out of which the unfair labor practice arose* and the statute provides that is the jurisdictional *strike* in which the striking union attempts to force the employer to assign particular work to employees in its union." Since both the employer and the striking union were the parties to that dispute, the Board correctly concluded that the subsequent phrase in Section 10(k)—"the parties to the dispute"—encompasses not only the

competing unions but also the employer involved. Hence, unless all three parties—the two unions and the *employer*—have "agreed upon methods for the voluntary adjustment of the dispute," the Board itself must determine the dispute under Section 10(k).

The Board adopted this view of the relationship between Sections 8(b)(4)(D) and 10(k) shortly after the enactment of those provisions and since then has consistently decided 10(k) cases on this basis.[7] Moreover, the courts of appeals that have had occasion to review Board action in jurisdictional dispute cases have heretofore accepted the Board's view. See *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 326 F.2d 213, 216 (C.A. 3); *Local 450, International Union of Op. Eng.* v. *Elliott*, 256 F.2d 630, 635-636 (C.A. 5); *New Orleans Typographical Union No. 17* v. *National Labor Rela-*

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[7] See, *e.g.*, *Lodge 68 of the Int'l Ass'n of Machinists (Moore Drydock Co.)*, 81 NLRB 1108, 1113-1114 (1949); *Int'l Longshoremen's Union, Local No. 16 (Juneau Spruce Corp.)*, 82 NLRB 650, 655-656 (1949); *United Brotherhood of Carpenters, Local 943 (Manhattan Construction Co.)*, 96 NLRB 1045, 1048-1049 (1951); *Int'l Union of Operating Engineers, Locals 17, 17A, and 17B (Empire State Painting Co.)*, 99 NLRB 1481, 1485 (1952); *United Ass'n of Journeymen, etc., Local 428*, 108 NLRB 186, 197-198 (1954); *Millwrights Local 1102, United Brotherhood of Carpenters (General Riggers and Erectors, Inc.)*, 127 NLRB 26, 29 (1960); *Int'l Union of Operating Engineers, Local 66 (Frank P. Badolato & Son)*, 135 NLRB 1392, 1395-1396 (1962); *Newspaper & Mail Deliverers' Union of New York (News Syndicate Co.)*, 141 NLRB 578, 580 (1963); *Operative Plasterers Int'l Ass'n (Twin City Tile and Marble Co.)*, 152 NLRB 1609, 1611, 1615 (1965); *Int'l Union of Operating Engineers, Local 49 (Egan-McKay Electrical Contractors, Inc.)*, 164 NLRB 672, 673 (1967).

tions Board, 368 F.2d 755, 763 (C.A. 5). See also *Quinn* v. *National Labor Relations Board*, 61 LRRM 2690, 2692 (C.A. D.C.), March 29, 1966, concurring opinion of Chief Judge Bazelon.

The court below construed the term "such dispute" in Section 10(k) to refer only to the jurisdictional dispute as to which union will be assigned the work in question, concluding that only the competing unions are parties to that dispute. The court relied primarily on the ground that the employer in a jurisdictional dispute is a "neutral * * * caught in the crossfire between the disputing unions and unable to satisfy either," and that the "purpose of protecting the neutral employer is fully served by any binding settlement between the disputing employee groups"; he "cares not how the dispute is decided but wants merely that it be decided" (App. A, pp. 37-38).

The notion that an employer is necessarily a neutral party in a jurisdictional dispute is contrary to economic realities, particularly in the building and construction industry. There are, to be sure, many jurisdictional disputes in which the employer may be indifferent as to which group of the competing employees performs the work.[8] But there are many other

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[8] This was the situation, for example, in *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union (CBS)*, 364 U.S. 573, relied on by the court below (App. A, pp. 36-38), where the employer, employing both technicians and stage hands, was neutral as to which group performed the lighting work in dispute. The Court there was not concerned with the issue presented in this case but merely with whether the Board, when it concededly had jurisdiction under Section 10(k), was required to decide the jurisdictional

disputes in which the employer's economic interests will be directly affected by the assignment of the work and in no meaningful sense can it be said that he is a neutral in the dispute or indifferent to its resolution. A change in the assignment of the work may result, for example, in different terms or conditions of employment, replacement of employees with outsiders, higher wages or costs, or even the displacement of the employer himself. In the instant case, for example, neither Texas State nor Martini has an agreement with Plasterers—both had a contract with the Tile Setters governing the work in dispute; an award of the work to Plasterers would have required these contractors either to hire a new complement of employees represented by Plasterers or to give up their subcontract.

Indeed, the fact that the National Joint Board included employer groups in its structure[9] is a dra-

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dispute on its merits, taking into account all relevant criteria, or was limited to determining whether one union was entitled to the work by virtue of an outstanding Board certification or contract. The Court held that the Board had the former duty, which it fully discharged here (see n. 5, *supra*).

[9] The Joint Board was created by agreement between the Building and Construction Trades Department, AFL-CIO and the Associated General Contractors of America and eight specialty contractors' associations. J. Dunlop, *Jurisdictional Disputes*, New York University, Second Annual Conference on Labor, 496. The agreement, which became effective May 1, 1948, specifically provided that "only those contractors who employ members of the organizations affiliated with the Building and Construction Trades Department of the AFL-CIO shall be considered as bound by this agreement when they have signed a stipulation setting forth that they are willing to

matic acknowledgement by the member unions of the importance of the employers' full participation in the dispute settlement processes, as well as their vital interest in the outcome of the Joint Board's decision. As John Dunlop, the first chairman of the Joint Board, pointed out: "The National Joint Board has demonstrated that both contractors and unions have a genuine common interest in jurisdictional issues and both have a vital contribution to make to their orderly settlement." J. Dunlop, *Jurisdictional Problems in Construction Industry*, 40 LRRM 18, 19. He further explained:

> The fact that some unions work exclusively, as a matter of policy or custom, for particular contractors tends to convert competition among contractors also into jurisdictional disputes between unions. If a contractor is to hire such a craft he must also hire a sub-contractor. More accurately, the dispute is between a contractor and a union on one side against another contractor and union on the other side.[10]

In view of the employer's potentially vital interest in the outcome of these disputes, it is highly unlikely that Congress intended, as the court below implies, to exclude employers from the dispute settlement process.

The Board's construction of the Act fully comports with Congress' intent to encourage private settlement of jurisdictional disputes. Thus, if all the parties to

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subscribe to and be bound by the terms and provisions of this agreement." Plan for National Joint Board for Settlement of Jurisdictional Disputes, Article III, Sec. 7.

[10] Dunlop, *op. cit.*, n. 9, *supra*, at 486.

the dispute have in fact agreed upon a method of adjustment, the Board will not hold a Section 10(k) hearing if one or more of the parties, including the employer, either refuses to utilize the agreed-upon method or to abide by its decision. And, if that decision rejects the work claim of the striking union and it nonetheless continues to strike, the Board will immediately proceed on any 8(b)(4)(D) unfair labor practice charge filed against that union. See *Int'l Brotherhood of Teamsters, etc., Local No. 236 (Wm. F. Trayler)*, 97 NLRB 1003, 1006-1007 (1952); *Local Union No. 9, Wood, Wire, and Metal Lathers Union (A. W. Lee, Inc.)*, 113 NLRB 947, 953-954 (1955); *Wood, Wire and Metal Lathers Union, Local No. 2 (Accoustical Contractors Ass'n of Cleveland)*, 119 NLRB 1345, 1350-1355 (1958); *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 410 F.2d 5, 8-9 (C.A. 3), certiorari granted on other grounds, 397 U.S. 905; 29 C.F.R. 102.93.

b. The legislative history does not support the decision below. The debates and committee reports do not discuss what Congress meant by the term "parties to such dispute" in Section 10(k). As Judge MacKinnon pointed out in his dissent below, "there is a very good reason" why the "members of Congress just did not address themselves to the point" (App. A, p. 56):

> The bill originated in the House and at that stage it merely defined jurisdictional strikes and made them unlawful * * *. This treatment of juris-

> dictional strikes was supplanted in the Senate bill by a section 10(k) the principal provision of which empowered and authorized the NLRB to appoint an arbitrator to hear and determine such disputes. This provision for the NLRB appointment of an arbitrator was removed in the Conference Committee and section 10(k) then for the first time assumed its present character * * *. While the 10-day provision was always a part of 10(k) from the time it emerged in the Senate bill it attracted no notice because it was always overshadowed by the provision for the Board to appoint an arbitrator.[11]

The expressed hope of Senator Morse that Section 10(k) would encourage unions to set up machinery for the settlement of jurisdictional disputes within their own ranks (App. A, pp. 39-40) does not suggest a different conclusion. In the statement the court cited, Senator Morse specifically referred to union machinery "settling such disputes *short of economic action*" (*id.* at 40 emphasis added). In other words, he believed that, with the threat of governmental resolution of the dispute under Section 10(k) hanging over their heads, the unions would in most cases resolve the dispute among themselves *without* embroiling the employer through coercive economic action; his comments do not indicate that, once such action is utilized, the unions could, under Section 10(k), settle the dispute solely between themselves without the em-

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[11] The legislative history is detailed in *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union (CBS)*, *supra*, 364 U.S. at 581-582.

ployer's participation.[12] Indeed, Senator Morse did not address himself in any way to the situation in which the employer asserted an interest in the outcome of the dispute.

c. Finally, the court below found "persuasive evidence" for its view in the "fact that the employer is not bound by a 10(k) determination of the Board" (App. A, p. 33). To be sure, the statute does not compel the employer to abide by a 10(k) determination. But this does not lessen the employer's direct interest in the resolution of the dispute or relegate him to the status of a disinterested neutral "who cares not how the dispute is decided but wants merely that it be decided" (App. A, p. 38). Moreover, since the successful union in the Section 10(k) proceeding can utilize economic pressure to enforce the award against the unwilling employer without violating Section 8(b)(4)(D),[13] the employer, as a practical mat-

[12] The passage from the House Conference Report, relied on by the court below (App. A, p. 40), likewise does not aid its position. While the language italicized by the court states that Section 10(k) would empower the Board to hear and determine "disputes between unions," this language is followed by the phrase "giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes)." Since a jurisdictional strike necessarily implicates the employer, the passage as a whole can just as readily be read as supporting the Board's view that, by the time a jurisdictional dispute is ripe for Board determination under Section 10(k), there are three parties—the two unions and the employer who is being pressured to change his work assignment.

[13] By its terms, Section 8(b)(4)(D) exempts economic pressure where the "employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." Since the

ter, is under compelling pressure to accept a 10(k) determination.[14] See also *Local 502, Int'l Hod Carriers (Cement-Work, Inc.)*, 140 NLRB 694 (1963).

2. The question whether the Board may hear and determine jurisdictional disputes where the unions, but not the employer, have agreed to be bound by a voluntary method of adjustment is, as the cases cited in note 7, *supra*, show, an important and recurring one in the administration of the Act. The issue has taken on additional importance by reason of the recent withdrawal of the Associated General Contractors of America ("AGC") from participation in the Joint Board plan.[15] The decision of the court below thus

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decision in *Radio Engineers Union*, n. 8, *supra*, requiring the Board to determine a jurisdictional dispute on its merits, the Board's General Counsel has viewed a Board 10(k) award as an "order" within the meaning of the exemption to Section 8(b)(4)(D). See *Hoisting and Portable Engineers Local 701*, Case No. 36-CD-55.

[14] Where the employer has not agreed to be bound by a Joint Board decision, a union which gets an award in its favor may be able to obtain, in a suit under Section 301 of the Labor Management Relations Act (29 U.S.C. 185), an order compelling the losing union to abandon its claim to the work in dispute; but such an order does not necessarily require the employer to assign the work to the winning union.

[15] AGC is a national association representing approximately 9,000 general construction contractors throughout the country, who perform about 80 percent of the construction in the industry; there are also numerous specialty contractors who hold associate memberships in local chapters of the AGC. Motion of AGC for leave to file Memorandum *Amicus Curiae* in support of the Board's Petition for Rehearing, p. 2. "In 1969, upon due notice and after failing in lengthy negotiations to secure certain reforms in the Plan, the AGC terminated the

clouds with uncertainty the Board's role in the determination of a substantial number of jurisdictional disputes. A prompt resolution of the issue by this Court is accordingly required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD B. STONE,
Assistant to the Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MARVIN ROTH,
Attorney,
National Labor Relations Board.

DECEMBER 1970.

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current Joint Board Plan. The AGC later refused to become a signatory to a new Plan that went into effect on April 3, 1970 * * *." Memorandum *Amicus Curiae* of the AGC, pp. 4-5. (These documents were filed in the court of appeals.)

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,073

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

TEXAS STATE TILE & TERRAZZO CO., INC., ET AL., AND LOCAL UNION 20 BRICKLAYERS, ETC., LOCAL UNION 108 INTERNATIONAL ASSOCIATION OF MARBLE, ETC., POLISHERS, ET AL., INTERVENORS

On Petition to Review and on Cross-Petition to Enforce an Order of the National Labor Relations Board

Decided June 30, 1970

Judgment entered this date

Mr. Donald J. Capuano, with whom *Mr. Martin F. O'Donoghue* was on the brief, for petitioner.

Mr. Peter Ames Eveleth, Attorney, National Labor Relations Board, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General

Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, *Elliott Moore* and *Hans J. Lehmann*, Attorneys, National Labor Relations Board, were on the brief, for respondent.

Mr. Wayne S. Bishop for intervenors, Tile Contractors Association of America, Inc., Texas State Tile & Terrazzo Co., et al.

Mr. Jerry D. Anker for union intervenors.

Messrs. Louis Sherman and *Elihu I. Leifer* filed a brief on behalf of the Building and Construction Trades Department, AFL-CIO, as *amicus curiae.*

Miss Leslie Thacker filed a brief on behalf of Ceramic Tile Institute of America, et al., as *Amicus Curiae.*

Before: MCGOWAN, LEVENTHAL and MACKINNON, *Circuit Judges.*

LEVENTHAL, *Circuit Judge:* This appeal concerns the provisions of the National Labor Relations Act ("Act"), 29 U.S.C. § 141 et seq., applicable to jurisdictional disputes. The particular jurisdictional dispute involves whether the job of applying a coat of mortar on a wall to be tiled should be given to the Plasterers or the Tile Setters (that is, to petitioner, Plasterers Local Union No. 79, Operative Plasterers and Cement Masons' International Assn., AFL-CIO, or to intervenor, Tile Terrazzo and Marble Setters Local Union No. 20 of the Bricklayers, Masons and Plasterers International Union).

Following a hearing pursuant to § 10(k) of the National Labor Relation Act,[1] the National Labor Relations Board hereafter "Board," awarded the

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[1] 29 U.S.C. § 160(k).

work in dispute to the Tile Setters.[2] The issue is whether it was error for the Board to have conducted a 10(k) hearing after being timely advised that both unions had agreed to be bound by the decisions of the National Joint Board for the Settlement of Jurisdictional Disputes, an arbitration panel established by the Building Trades Department, AFL-CIO, hereafter the "Joint Board."

The Plasterers claim the Joint Board awarded the work to them,[3] and that it was error for the Board to make a 10(k) determination. The Board's position is that while it may not hold a 10(k) hearing when the parties to a jurisdictional dispute have agreed on a method for voluntary adjustment of the dispute, this bar does not arise unless all the parties to the dispute are bound by the voluntary adjustment procedure. Because the Board considers the employer to be a party to the dispute, and because the employers making work assignments in the instant disputes were not bound by the determinations of the Joint Board, the Board contends that it properly held a 10(k) hearing.

These questions are before this court on the petition of Plasterers to review, and the cross-application of the Board to enforce, a June 27, 1968 order in which the Board found that Plasterers had committed an unfair labor practice in violation of § 8(b) (4) (D)

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[2] The Board's Decision and Determination of Disputes under § 10(k) was issued on August 22, 1967, and is reported at 167 NLRB No. 23.

[3] The Plasters also argue that assuming statutory authority to make an award, the Board's decision and order were arbitrary as reflecting an excessive weight given by the Board to the factor of the employer's assignment, and a failure to give due consideration to other factors which supported the Plasterers claim. Our disposition of this appeal makes it unnecessary to reach this question.

of the Act [4] by picketing Texas State Tile and Terrazzo Company (Texas State), and Martini Tile and Terrazzo Company (Martini), with the object of forcing these employers to assign the disputed work to employees represented by Plasterers.[5]

We agree with the Plasterers that the Board may not properly proceed to determine a jurisdictional dispute pursuant to § 10(k) when the disputing unions have agreed to settle their dispute through binding arbitration. In as much as the Board's finding on an 8(b) (4) (D) violation incorporates and relies on an invalid 10(k) proceeding and award, the Board's order cannot be enforced.

I *The Jurisdictional Disputes*

The focus of these jurisdictional disputes can be traced to the development in the mid-1950's of the thin-set or adhesive method of applying tile. Previously it was necessary to set tile in a bed of wet plaster so that moisture would not be absorbed from the bonding agent before it hardened and formed a firm bond. The application of this setting bed or float coat was the work of tile setters. The thin-set method, on the other hand, employed new bonding agents which made it possible to apply tile directly to a smooth surface of dry plaster on a thin coat of dry-set mortar. The Tile Setters contended that they should prepare this smooth plaster surface just as they had prepared the wet setting bed. The Plasterers took the position that the tile setter was only entitled to apply his setting bed and that in the thin-set method it was the dry-set mortar and not the

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[4] 29 U.S.C. § 158(b) (4) (D).

[5] The Board's Decision and Order in the unfair labor practice phase of the case is reported at 172 NLRB No. 77.

smooth and dry plaster surface which constituted the setting bed.

The order concerns picketing which was directed against two different employers, at the sites of two unrelated jobs. The first was the M. D. Anderson Library Job at the University of Houston. Southwestern Construction Co., the general contractor for an addition to the library, had subcontracted to Texas State, a tile contractor employing members of the Tile Setters Union, the work of preparing walls and applying tile to four stairwells and two restrooms on each floor of the eight story building. The tile setters did their initial work in the lavatories where they applied the smooth coat of plaster. The Plasterers claimed this work as theirs, and when this claim was rejected by Tile Setters they submitted the dispute to the Joint Board.

On November 9, 1966, the Joint Board awarded the work in dispute to the Plasterers except that "any coat to be applied wet the same day under tile" was to be placed by Tile Setters. The award stated: "In the thin-set or adhesive method of applying tile to walls and ceilings, the plasterer shall apply the first and second coats of mortar that is the scratch coat and plumb coat. The plasterers shall plumb, rod and square all walls, rod and level all ceilings and the tile setter shall apply the final setting bed for his tile."

Plasterers thereupon claimed the remaining work of applying a smooth plaster coat on the basis of the award. The Tile Setters refused to relinquish the work, contending that the smooth plaster coat was the tile setter's "setting bed" and that therefore the Joint Board Award actually supported their claim. On January 24, 1967, Plasterers established a picketline on the jobsite and a work stoppage ensued. Southwestern Construction Company filed an unfair labor practice charge with the Board against Plasterers.

On February 10, 1967, the United States District Court for the Southern District of Texas granted the application of the Board's regional director for an injunction against the picketing and the pickets were removed.

On March 6, 1967, Plasterers requested that the Joint Board clarify its award in view of the contention of the Tile Setters that the award favored their claim. On March 15, 1967, the Joint Board issued a clarification which is set out in part in footnote.[6] The Joint Board made clear that the job of applying a smooth coat of plaster material to an initial scratch coat or to cement or clay tile walls was the work of the Plasterers unless the tile is set the same work day that such coat of plaster is applied.

The second job at which picketing occurred was at the Rainbo Bakery. Here there was no general contractor. Martini, who did not employ plasterers, had a direct contract with the owner calling for the tiling of two walls in one area of the bakery. Tile setters undertook to perform the application of a smooth coat of plaster to metal lath which had been tacked to

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[6] The Joint Board voted to clarify its job decision by stating that the coat of plaster material which is applied directly to the initial scratch coat or directly to clay title or cement block walls is for the primary purpose of plumbing, rodding and squaring of walls to receive tile and, in accordance with the agreement of record and the decision of record referred to above, shall be assigned to plasterers.

The Joint Board, in recognition of the problems created by having two different trades working at the same time on separately identifiable work operations, further voted that if the tile to be adhered to the coat of plaster material applied to the initial scratch coat or directly to clay tile or cement block walls is set during the same work day in which such coat is applied the plaster materials shall be applied by tile setters in the interest of efficient job operation.

masonry walls, and the application of dry-set mortar and tile to this plaster surface. The dispute was never submitted to the Joint Board. On March 17, 1967, two days after the clarification by the Joint Board described above, Plasterers picketed the jobsite for the purpose of having transferred to them that part of the work consisting of application of the smooth coat.

II *The NLRB Proceedings*

On April 6, 7 and 10 through 14, 1967, the Board held a consolidated § 10(k) hearing to determine these jurisdictional disputes. It issued its decision and determination on August 22, 1967. The Board rejected the Plasterers' contention that the notice of hearing should be quashed because the disputing unions had agreed on a method for voluntary settlement. It stated: "The Board has consistently held that the employer who assigned the disputed work must be a party to an agreement that purports to settle an existing jurisdictional dispute." On the merits of the dispute, the Board examined what it considered to be the relevant factors and concluded that Tile Setters were entitled to the work in dispute inasmuch as there was no significant difference between the two employee groups in terms of skill, and the various factors involved were all consistent with the employers assignment of the disputed work.

When Plasterers refused to comply with the Board's determination of the work disputes, the General Counsel of the Board issued a complaint against petitioner alleging a violation of § 8(b) (4) (D) of the Act. At the unfair labor practice hearing held on October 30, 1967, the parties agreed to submit on the record in the § 10(k) proceeding. In its decision and order of June 27, 1968, the Board again rejected Plasterers' claim

that the 10(k) proceeding was improperly held and found that the union had violated § 8(b) (4) (D). The Board's order provides that the union shall cease and desist from the use of prohibited means to force or require Texas State or Martini to assign to Plasterers the disputed work at the Anderson Library and Rainbo jobs. The Board also ordered that Plasterers take the affirmative action of posting a notice indicating their intention to abide by the Board's cease and desist order. The Board's petition for enforcement is predicated on Plasterers' refusal to take this affirmative action.

III *Mootness*

A motion to dismiss this case as moot has been filed by intervenor Tile Setters, and the other union intervenors associated with them.[7] They argue that mootness follows from the fact that the Anderson Library and Rainbo Bakery jobs have been completed and that the Board's cease and desist order now proscribes conduct in which it would be impossible for the Plasterers to engage. Both Plasterers and the Board have filed memoranda arguing that the case is not moot.

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[7] The other Union Intervenors are: Bricklayers, Masons and Plasterers International Union of America, hereafter "Bricklayers", International Association of Marble, Slate and Stone Polishers, Rubbers & Sawyers, Tile & Marble Setters' Helpers & Marble, Mosaic and Terrazzo Workers' Helpers, hereafter "Helpers," and Local 108 of the Helpers. Bricklayers is the parent organization of Tile Setters Local 20, whose members were performing the work sought by the Plasterers. The Helpers Union was also interested in the dispute because its members work directly with the Tile Setters, and would be replaced by members of another organization (Laborers' International Union of America) if the disputed work were assigned to the Plasterers.

Cease and desist orders of the Board aimed at remedying an unfair labor practice are frequently framed to account for changes in circumstances following the illegal practice. However, the issue of whether an unfair labor practice occurred is not mooted because the particular job involved has been completed. *Local 74, United Brotherhood of Carpenters & Joiners* v. *NLRB*, 341 U.S. 707, 715 (1951); *NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 271 (1938); *NLRB* v. *Plumbers Union of Nassau County*, 299 F.2d 497 (2d Cir. 1962).

There is precedent permitting the Board to quash a 10(k) proceeding where there could only be a stale hearing, held three years after the incident, and to dismiss the 8(b) (4) (D) complaint on the ground that "no affirmative order issued by the Board could have any effect on the parties to the original controversy since the work had long since been completed," *Tip Top Roofers, Inc.* v. *NLRB*, 324 F.2d 773 (5th Cir. 1963). But here the Board has issued an affirmative order, requiring *inter alia* the posting of notices, and Plasterers has refused to comply. We see no basis on this record for concluding that the Board acted impermissibly in viewing the controversy as being sufficiently broad and enduring to make appropriate affirmative relief. If the posting order was lawful the Board was entitled to a judicial decree of enforcement. The case is not moot.

IV *Proper Construction of Section 10(k) of the National Labor Relations Act*

The Board's reliance on the 10(k) record and determination in reaching its conclusion that Plasterers had committed an unfair labor practice preserves the 10(k) issue as a part of the review of the unfair

labor practice determination.[8] The case turns on the proper construction of § 10(k) of the National Labor Relations Act, one of the provisions added by the Taft-Hartley Amendments of 1947 as a result of Congressional concern over work stoppages arising out of jurisdictional disputes between unions.

Another provision added at the same time was § 8 (b) (4) (D), set forth in the footnote,[9] which broad-

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[8] "Since there is no independent review of § 10(k) work assignments, the only stage at which the [union] can contest the work award is on review of the § 8(b) (4) (i) (ii) (D) unfair labor practice order. If the § 10(k) order falls, the unfair labor practice order falls with it." NLRB v. Local 991, ILA, 332 F.2d 66 (5th Cir. 1964).

[9] (b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

* * * *

However, § 8(b) (4) (D) must be read in the light of § 10(k) which provides:

[Footnote continued on page 31]

ly prohibits a union from picketing and other actions to induce employees not to perform services for their employer with the object of forcing the employer to assign work to a particular union or craft.

Section 10(k), also set forth in footnote 9, empowers the Board to determine the jurisdictional dispute out of which the unfair labor practice charge has arisen, unless, in the words of an abstention provision, "the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute."

The Board held this abstention language of §10(k) inapplicable, even though the unions had agreed to be bound by the decisions of the Joint Board for the Settlement of Jurisdictional Disputes—a joint board with representatives of employers and employees,[10]—

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[9] [Continued]

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance of the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

[10] The amicus brief filed by the Building and Construction Trades Department, AFL-CIO, urging the adoption of the construction of § 10(k) advanced by Plasterers, describes the operation of the Joint Board. Article X of the Department's constitution provides that all jurisdictional disputes shall be settled and adjusted according to a plan established by the Department and that such plan "shall be recognized as final

on the ground that the employer was also a "party" and had not agreed to this method for voluntary adjustment.

In our view the Board erred in claiming authority under § 10(k) of the Act to determine the merits of a jurisdictional dispute between two unions when the unions had agreed on a method for binding arbitration of their disputes.

Meaning of Abstention Provision of § 10(k)

The crucial abstention provision does not require voluntary adjustment, or agreement on a method for voluntary adjustment, on the part of all parties to the 8(b) (4) (D) proceeding, or even all parties to the 10(k) proceeding. Abstention is commanded when "the parties to such dispute" have adjusted the dispute, or agreed on a method for the adjustment of the

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and binding upon the Department and upon all affiliated National or International Unions and their affiliated Local Unions." The disputing unions in the instant case, the Bricklayers and the Plasterers International Unions and their affiliated locals, the petitioner and intervenor, are affiliated with the Department.

The present "Plan for National Joint Board for Settlement of Jurisdictional Disputes" became effective on April 1, 1965. The Plan operates through the Joint Board, the Appeals Board and Hearings Panels established to render nationally effective decisions on an ad hoc basis. These Boards and Panels have both labor and contractor members, and the criteria for decision include inter-union agreements dividing work (the Green Book), established trade practice, practice in the locality and such factors as efficiency and economy of operation. The machinery of the Plan is operative regardless of whether or not the particular employer affected by such a dispute decides to be bound to the Plan. The Plan provides that any decision of the Joint Board, or of the Appeals Board if an appeal it taken, "shall be immediately accepted and complied with by all parties to this Agreement."

dispute. The text of § 10(k) shows that the term "such dispute" refers to the underlying jurisdictional "dispute out of which such unfair labor practice shall have arisen." It is not the employer but the rival unions (or other employee groups) who are the parties to the jurisdictional dispute contesting which employees are entitled to seek the work in question.

Congress could have written § 10(k) so that the employer would be a necessary party to a procedure for voluntary settlement by requiring agreement on such a procedure by both the parties to the unfair labor practice charge and the parties to the underlying dispute out of which that charge arises. That Congress did not choose this approach but instead required only agreement by the unions involved in the underlying jurisdictional dispute is easily understood in the light of the refusal of Congress to bind the employer to the Board's determination of a jurisdictional dispute under § 10(k). Rather than enacting a comprehensive solution to the work assignment problem, which would have required provision for binding the employer to a determination concerning who was entitled to the work. Congress went only so far as to assure that at least the employer would not be plagued by the failure of the disputing unions to resolve their dispute. The fact that the employer is not bound by a 10(k) determination of the Board is persuasive evidence that Congress did not intend a voluntary procedure for adjustment to be held inadequate because the employer is not bound.

Although the precise question before us is, in any meaningful sense, one of first impression in the federal courts,[11] we find authority for our view not only

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[11] We do not read the cases cited in footnote 2 of the dissenting opinion as authoritative support for the Board's position. While we would not pass over a reasoned view contrary to the

in the text of § 10(k) but also in judicial precedents construing the provisions of the Act dealing with jurisdictional disputes and in the legislative history and congressional purpose underlying these provisions.

Protection Pending Determination under Voluntary Procedure

We interject preliminarily the observation that the provision for Board abstention pending resort to a voluntary adjustment procedure does not remove the machinery provided by the Act for interim protection against work stoppages.

Congress gave to the Board authority to insure that the jurisdictional dispute will not be the cause for further work stoppage while either voluntary procedures, or Board-conducted procedures for determination under § 10(k), are running their course. Section 10(*l*), quoted in the footnote,[12] authorizes the

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one here taken, these cases do not attempt to grapple with the issue before us apparently for the reason that they are not cases where the Board's interpretation was challenged or where disposition turned on the resolution of this issue. The Board's brief candidly admits that these cases have no more than "adverted to" the issue before us and contends merely that they "reflect" its view.

[12] (*l*) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in

question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law; *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

The vigilance of the General Counsel in applying for injunctions in 8(b) (4) (D) cases was noted in K. Strand, Jurisdictional Disputes in Construction: The Causes, the Joint Board and The NLRB 119, n. 1 (1961).

Board to seek a District Court injunction whenever the cognizant Board employee has reasonable cause to believe in the truth of a charge of an unfair labor practice violative of § 8(b) (4) (D). That injunction remains in effect "pending the final adjudication of the Board with respect to such matter." Where the Board is conducting a 10(k) proceeding it must make a final determination under § 10(k) before it may proceed to final adjudication of an 8(b) (4) (D) charge. In a case governed by the abstention provision of § 10(k) the proceeding on the 8(b) (4) (D) charge stays in being and is not dismissed unless and until the parties have not only agreed on methods for voluntary adjustment but have actually reached a voluntary adjustment of their dispute. Thus the Act provides a "speedy remedy . . . to preserve the status quo" [13] and avoids any hiatus in protection against forbidden means of pressing jurisdictional claims.

CBS Opinion

Focusing on § 10(k) we find guidance and indeed instruction on its meaning, its inter-relationship with § 8(b) (4) (D), and the pertinent legislative history, in *NLRB* v. *Radio and Television Broadcast Engineers Union* [*CBS*], 364 U.S. 573 (1961).

First, as to the meaning of the terms of § 10(k), the Supreme Court said (364 U.S. at 579): "[T]he clause 'the dispute out of which such unfair labor practice shall have arisen' can have no other meaning except a jurisdictional dispute under § 8(b) (4) (D) which is a dispute between two or more groups of employees over which is entitled to do certain work

[13] Local 450, International Union of Operating Engineers, AFL-CIO v. Elliott, Regional Director, 256 F.2d 630, 634 (5th Cir. 1958).

for an employer." Since a jurisdictional dispute for purposes of § 10(k) is a "dispute between two or more groups of employees," it follows that these employee groups are "the parties to such dispute" for purposes of determining whether there exists a voluntary adjustment procedure within the abstention provision of 10(k).

Second, as to the purpose of § 10(k), the Court stressed that "§ 10(k) offers strong inducements to quarrelling unions to settle their differences . . . ." 364 U.S. at 577.[14] Where the quarrelling unions have agreed on a procedure for settling their differences, the purpose of § 10(k) to induce settlement is manifestly served by respecting their use of the agreed procedure.

As to the purpose of § 10(k) and § 8(b) (4) (D) taken together, the Court noted that the legislative history contained a recognition of "the necessity of enacting legislation to protect employers from being 'the helpless victims of quarrels that do not concern them at all'," *id.* at 580-81, i.e. to protect the neutral employer caught in the crossfire between the disputing unions and unable to satisfy either, in other words "caught between the devil and the deep blue." 364 U.S. at 575. The purpose of protecting the neutral employer is fully served by any binding settlement

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[14] This is reenforced by the Court's reference, to the history of these provisions, which came in the wake of a "continuing and widely expressed dissatisfaction with jurisdictional strikes." *See* 364 U.S. at 580, where the Court continued:

> As one of the forerunners to these very provisions of the Act, President Truman told the Congress in 1947 that disputes "involving the question of which labor union is entitled to perform a particular task" should be settled, and that if the "rival unions are unable to settle such disputes themselves, provision must be made for peaceful and binding determination of the issues."

between the disputing employee groups. The neutral employer is one who cares not how the dispute is decided but wants merely that it be decided.

Further Examination of Legislative History

We have undertaken a fresh examination of the relevant legislative history. That history forcefully supports the conclusion that Congress intended in § 10(k) to encourage disputing unions to establish inter-union machinery for settling jurisdiction disputes and to afford them an opportunity to exhaust this machinery.

The original Honse bill contained nothing comparable to § 10(k). Senator Morse, who proposed the forerunner provision which emerged, with relatively minor modification, as § 10(k), prepared a "definitional" memorandum, which stated that while there are various kinds of "jurisdictional disputes" they have as their common ingredient a controversy between two or more labor unions." I Legis. Hist. 951.[15]

Senator Morse proposed a subsection (k) which, as appears from its text in the footnote,[16] is virtually

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[15] "Legis. Hist." refers to the compiled Legislative History of the Labor Management Relations Act, 1947, published by the NLRB (1948).

[16] *See* II Legis. Hist. 987: "(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (2)(A) of section 8(b), the Board is empowered to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute, unless, within 10 days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or the arbitrator

the same as what is now § 10(k). It provided for Board determination of "the dispute out of which such unfair labor practice shall have arisen" unless "the parties to such dispute . . . have adjusted or agreed upon methods for the voluntary adjustment of such dispute." (Senator Morse also proposed enlargement of definition of unfair labor practices and authority in the Board to seek Federal injunctions pending determination of the disputes.). In supporting his proposal he referred to his own experience during World War II as a member of the War Labor Board whose undertaking of jurisdiction to determine jurisdictional dispute work stoppages resulted in a policy whereby "we would give the union leaders involved in a jurisdictional dispute 24 hours to proceed to settle the dispute without a work stoppage, and upon their failure to do so we would appoint an arbitrator whose decision would be final and binding." And he predicted that the same incentive to union settlement would follow from the post-war adoption of his proposal to amend the National Labor Relations Act. He stated:

> [P]robably one of the greatest benefits that will come from the adoption of such amendments to the Wagner Act as I am proposing this afternoon will be action on the part of the unions themselves to see to it that it does not become necessary, unless in exceptional cases, to resort

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appointed by the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

The § 8(b) (2) (A) proposed by Senator Morse was similar to what has become § 8(b) (4) (D), though it defined an unfair labor practice in terms of an inducement to refuse services "because particular work tasks of such employer or any other employer are performed by employees who are or are not members of a particular labor organization." II Legis. Hist. 986.

> to the machinery which I have proposed in these amendments . . . . because the unions themselves will proceed to establish within their own organizations machinery capable of settling such disputes short of economic action.[17]

While in some respects the Congress departed from Senator Morse's proposals,[18] Congress retained the thought obtained from his subsection (k), of a machinery for Board determination, an abstention provision where the parties agree on a procedure for settlement, and of an incentive to determination by the parties to the dispute. And there can be no doubt that the parties to the jurisdictional dispute were conceived of as the rival unions, or employee groups. This appears not only from the presentation of Senator Morse, but from the use of the same core concept of the underlying dispute as the jurisdictional dispute between the unions, in the House Conference Report, a document of highest standing in ascertaining legislative intent.

In its recommendation for adoption of § 10(k), the House Conference Report stated:

> The Senate amendment also contained a new section 10(k), which had no counterpart in the House bill. This section would empower and direct the Board to hear and determine *disputes between unions* giving rise to unfair labor practices under section 8(b) (4) (D) (jurisdictional strikes). [Emphasis added.][19]

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[17] II Legis. Hist. 983.

[18] His subsection (k) was modified so as to make Board determination compulsory rather than discretionary and to remove the provision authorizing reference by the Board to an arbitrator.

[19] I Legis. Hist. 561.

There was general agreement on the view that § 10 (k) had merit as stimulating settlement machinery *within the ranks of labor*, agreement even from legislators opposed to other elements of the new law.[20]

Consideration of the Board's Contrary Construction of § 10(k)

The meaning of § 10(k) as we understand it is contrary to the construction announced by the Board. That agency's construction is entitled to deference. However, the text, legislative history and purpose, and precedent, combine to negative the aura of doubt which creates the occasion for giving weight to the Board's construction. *See CBS, supra*, at 585; *Truck Drivers and Helpers* v. *NLRB*, 101 U.S.App.D.C. 420, 249 F.2d 512 (1957), *cert. denied*, 355 U.S. 958 (1958). If there was room for doubt prior to *CBS*, that decision should have alerted the Board to modify its interpretation.[21]

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[20] *See* Legis. Hist. 1046, setting forth Senator Murray's favorable comment on this provision:

> We are confident that the mere threat of governmental action will have a beneficial effect in stimulating labor organizations to set up appropriate machinery for the settlement of such controversies within their own ranks, where they properly should be settled.

[21] In the wake of *CBS*, departing as it did from long-standing precedents and approach of the Board, commentators probing the various interrelated problems in depth attacked the Board's continuance of its definition of "parties" for purposes of § 10(k) abstention provision.

See Sussman, *Section 10(k): Mandate for Change?*, 1967 B.U.L.REV. 201, 229 ("The NLRB is incorrect in presently requiring that the employer be a party to an agreement procedure before it satisfies the standards necessary to avoid a Section 10(k) hearing"); *ABA Section on Labor Relations Law, Report of the Special Committee on the Building and*

Nor is the Board's construction entitled to greater deference because of the mere fact that the 1959 amendments to the Taft Hartley Act did not modify § 10(k). Reenactment of a section of law does not of itself constitute conclusive legislative approval of either decisions or administrative regulations construing the provision, in the absence of a showing that the attention of Congress was specifically directed to the matter at hand. That is the teaching of *Helvering* v. *Hallock*, 309 U.S. 106 (1940), and *Girouard* v. *United States*, 328 U.S. 61 (1946), decisions whose vitality is underscored by the very recent opinion in *Boys Markets, Inc.* v. *Retail Clerk's Union*, —— U.S. —— (June 1, 1970). In *Boys Market* the Supreme Court reiterated its stricture against assigning conclusive weight to congressional silence as acceptance of a ruling "in the absence of persuasive circumstances evidencing a clear design" that congressional inaction denoted acquiescence.

Although the Taft-Hartley Act was amended in 1959, there is no indication that Congress gave consideration to the issue now before us, or even to the subject of jurisdictional strikes. Its inaction concerning a provision whose meaning we do not find really doubtful is not accompanied by any circumstances or indications from which we can discern a "clear design" to accept the Board's rulings.

Additional Court Precedent

We are in accord with the reasoning in *Penello* v. *Local Union No. 59, Sheet Metal Wkrs. Int. Assn.*,

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Construction and Industry 452, 456 (1965) ("By the term 'parties' those legislators who discussed the matter indicated that Congress means the disputing unions themselves."); Cohen, *The NLRB and Section 10(k): A Study of the Reluctant Dragan*, 14 LAB. L.J. 905, 909 (1963); Note, 77 YALE L.J. 1191, 1201-02 (1968).

195 F.Supp. 458 (D.Del. 1961), which rejected the view that the employer's resistance "could be the sole factor making inoperative" the "voluntary adjustment" abstention provision of § 10(k). Judge Wright declared (at p. 466):

> Petitioner would have the Court ignore this policy of § 10(k), however, for his theory apparently is that no agreement between the groups of employees involved can stay the operation of § 8(b) (4) (D) so long as the employer does not agree. But this argument proves too much, for not only does the Supreme Court view the policies of § 10(k) as directed towards inducing voluntary settlement between the groups of employees involved, but also the language of that section would seem to compel it.

Rejection of Policy Argument of Board Counsel Overstressing Need To Obtain Employer Acquiescence

To this court counsel for the Board presented an argument on policy grounds that the Board's construction of § 10(k) is sound because it is best suited to preservation of industrial peace. We were not specifically cited to Board opinions wherein this policy was set forth by the Board as contrasted with argument of counsel. *See Braniff Airways, Inc.* v. *CAB*, 126 U.S. App.D.C. 399, 379 F.2d 453 (1967). But let us consider the contention on its merits.

Board counsel argue (Brief at 17):

> Employer acceptance of the "voluntary adjustment" is a prerequisite of final resolution of the dispute, because the employer does not commit an unfair labor practice by ignoring the award made under Section 10(k) . . . . Securing the employer's participation in the dispute-settle-

> ment phase enhances the likelihood . . . that he will accept the result. . . .

A similar starting point, that the employer is not bound by the 10(k) determination was the premise of the argument made by the Board in CBS—and without success.[22] This approach harbors the difficulty of a built-in tendency (not necessarily an absolute rule) to give controlling weight to the determination of the employer—because he is not required to comply with the determination of the Board. A similar appraisal was part of the Court's reasoning in *CBS* for rejecting the Board construction there involved (364 U.S. at 579):

> For, in the vast majority of cases, such a narrow determination would leave the broader problem of work assignments in the hands of the employer, exactly where it was before the enactment of § 10(k)—with the same old basic jurisdictional dispute likely continuing to vex him, and the rival unions, short of striking, would still be free to adopt other forms of pressure upon the employer.

Scope Given Voluntary Arbitration Procedures

Our conclusion that agreement for binding arbitration between the disputing unions is effective to stay

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[22] It argued that if a striking union which had no claim to the work under a Board order or certification, or a contract, established its right to the work upon the basis of such factors as custom, tradition, etc., it would be necessary, in order to prevent the 10(k) determination from being "virtually pointless," to construe 8(b) (4) (D) as permitting a union to strike to compel compliance with a 10(k) award. (Br. for NLRB at 9, 10, 20-26.) This would "encourage the very jurisdictional strikes which the Sections were intended to prevent." (Br. for NLRB at 25.)

a determination by the Board under § 10(k) is also supported by the general principle that full scope should be given to voluntary arbitration procedures. *Carey* v. *Westinghouse Corp.*, 375 U.S. 261 (1964). Not least of the advantages is the relative speed of voluntary arbitration, as compared with Board adjudicatory procedures—a matter of manifest significance in the handling of jurisdictional strikes.[23]

Importance of Permanent Resolution of Dispute

Furthermore, and significantly, the availability of a binding agreement between the disputing unions creates means of enforcing a permanent resolution of the jurisdictional dispute not otherwise available to the Board. The Act does not authorize the Board to compel an employer to change his assignment, or a union to renounce an assignment that the employer is willing to give. But an award arising out of voluntary binding arbitration can be enforced by peaceful means. The impetus for unions to live up to interunion agreements rests on reinforcing considerations of honor, reciprocity, mutuality—and enforceability. The winning union may bring an action, either in federal court under § 301 of the Taft-Hartley Act or in state court, to secure injunctive relief against a union that has failed to abide by its agreement to honor the Joint Board decision and renounce the work.[24]

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[23] K. Strand, Jurisdictional Disputes in Construction: The Causes, The Joint Board and the NLRB 103-104 (1961).

[24] Additional avenues to enforcement are provided by the Joint Board itself. The Joint Board's procedural Rules and Regulations set out compliance procedures which provide, *inter alia*, that when a union is declared to be in noncompliance, no job decisions shall be issued in favor of that trade

While delay may be involved before the union can secure an adjustment in fact, e.g., by prevailing in its suit for enforcement of the arbitration agreement, the public interest is safeguarded in the interim by the injunction obtained under § 10(*l*). That injunction remains in effect pending the ultimate adjustment, and may, indeed, give the winning union incentive to pursue with diligence legal enforcement of an award in its favor. Problems may arise in fact under this procedure if the employer tempts the losing union with continued offers of the work in dispute, but to give the losing union a legal right to another bite at the apple in the 10(k) proceeding is only to permit the jurisdictional battle to begin anew as a matter of right and principle, whereas a central objective of § 10(k) is to strengthen enforcement of agreements reached by the unions.

The construction of § 10(k) approved today means that proceedings on 8(b) (4) (D) unfair labor practices charges may be terminated because of union agreements reached after the proceedings are begun. But that is precisely the purpose of § 10(k) as expressed in *CBS*, where the Court said (364 U.S. at 576-77):

> Section 10(k) . . . quite plainly emphasizes the belief of Congress that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions.

It also means that proceedings may be dismissed although an employer is dissatisfied with, and would prefer to contest and litigate, the agreement reached by the unions. The special provisions were passed, however, to protect the employer who was "neutral" in the dispute.

Special Provisions of § 10(k) Inapplicable to Employers Not Truly Neutral in Jurisdictional Dispute

An employer properly has standing under these provisions when he is plagued by employee groups that do not agree, and not when he is dissatisfied with the way they do agree. This principle has indeed been recognized by the Board's so-called Safeway doctrine in cases where an unfair labor practice violation has been followed by actual agreement between unions, with renunciation of the work.[25] In

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[25] Highway Truckdrivers & Helpers, Local 107, Int'l Bhd of Teamsters (Safeway Stores, Inc.), 134 NLRB 1320 (1961); Local 1905, Carpet Linoleum & Soft Tile Layers (Butcher and Sweeney Constr. Co.), 143 NLRB 251 (1963).

In Quinn v. NLRB (Don Cartage Co.) 61 LRRM 2690 (1966) this court remanded a Board disposition of a 10(k) proceeding made on the basis of a decision by one union renouncing the particular work. This was *not* accepted as a settlement of the dispute by the other union. The Board decided that the dispute before it in the 10(k) proceeding should be limited to the particular work, leaving the broader dispute for reference to the new Joint Board established in 1965, which heightened provision for employer participation and attention to employer interests (*see* note 27, *infra*). That 1965 procedure to settle the broad dispute was established more than 10 days after the charge was filed in 1964, and hence, under the terms of § 10(k), came too late to be a mandatory procedure even if the 10(k) proceeding was viewed as extending to the broad dispute. This court held that the 10(k) dispute involved in that case was a broad dispute—the case having taken shape, by agreement of all parties, including the Board's General Counsel, as relating to the broad, continuing dispute, and a long proceeding, with full evidence, had been held on the issue given this scope. All that was involved was a ruling that on the facts of that case the Board had abused its discretion in endeavoring to narrow the dispute awaiting its determination.

those cases the Board agrees that there is no longer a jurisdictional dispute.

The essential point is that the employer's economic interests do not require the Board to pursue the matter under § 10(k) even though (a) there was an unfair labor practice under § 8(b) (4) (D) in the first instance and (b) the employer is not really neutral as between the unions but makes it clear that he is dissatisfied with the adjustment on which they have agreed. The same principle is fairly operative when the unions have agreed on a method for obtaining an adjustment, a binding arbitration that the unions will generally observe and have power to enforce.

The Taft-Hartley Act, though broad and unqualified in its terms, must be taken in light of its dominant purpose to protect "neutral" employers. This aspect of the "common law" of labor relations has been infused into the meaning of the Act in cases involving the provisions of the law broadly prohibiting secondary boycotts.[26] A similar principle is also applicable to ensure the kind of application of the jurisdictional dispute provisions that was intended by Congress.

We need not consider whether in some other case the Board could continue with a § 10(k) proceeding because the rival employee groups had not reached an actual agreement and their agreement on a procedure for adjustment was subject to an infirmity that undercut its fairness and reliability as a method of achieving the industrial peace that is the ultimate objective of Congress.[27] It may also be that the Board

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[26] Woodwork Mfg. v. NLRB, 386 U.S. 612, 625; International Bhd. of Elec. Workers v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950), *aff'd.*, 341 U.S. 694 (1951).

[27] Thus, we need not consider the efficacy for purposes of § 10(k) of an inter-union proceeding that made no realistic

has discretion to conclude that a paper agreement between disputing unions does not in fact reflect an operative mechanism likely to resolve the dispute. No such contention has been advanced by the Board either as to the general operation of the Joint Board plan or as to its handling of this particular inter-union dispute. Under these circumstances we hold that the presently operative Joint Board plan which creates in the unions not entitled to disputed work a legally enforceable obligation to renounce the work can be and was intended by Congress to be perserved as a private-ordering mechanism for the resolution of jurisdictional disputes. We conclude that § 10(k) was intended to give full play to this private-ordering mechanism, and requires the Board to abstain from adjudication while it is being pursued.[28]

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provision for meaningful attention to the interest of the employer and to questions of efficiency. In the case before us we have a Joint Board of employers and employees and one that was specifically organized and maintained for the purpose of coping with the requirements of the Taft-Hartley Act and the need for the effective resolution of jurisdictional disputes. It is a board that takes into account factors of economy and efficiency of operation. The construction industry is typically beset by conflicts in which a group of employees and their employers (sometimes, of course, subcontractors) are likely to be aligned with each other as against another alignment of a different group of employees and their employers.

[28] We do not determine whether the rule of this decision should be retroactive to prior 10(k) determinations in cases other than the one before us. The Supreme Court has in various instances given only prospective effect to rulings that upset a previous course of decision. See Desist v. United States, 394 U.S. 244 (1969) and cases there cited. In some cases our court, in overturning a long-standing administrative construction of a statute, has held that the balance of public interest is best served by withholding completely retroactive effect to our ruling. Blair v. Freeman, 125 U.S.App. D.C. 207, 370 F.2d 229 (1966). Certainly our ruling would

Our understanding of the thrust of Federal labor policy as developed by Congress proceeds along lines congruous to those developed by the Supreme Court in *Boys Markets, Inc.* v. *Retail Clerks, supra.* There the Court reversed a ruling of but nine years standing in order to maintain the efficacy of the arbitration remedy—viewed in the large as furthered by an injunction preserving the status quo pending the arbitral process. The Court stressed the importance of mutuality—that an employer could not be held to his contract to pursue the arbitration remedy if he could not obtain effective relief (including pendente lite injunction) to enforce the union's similar obligation. Our situation is marked by technical differences but similarity in principles. As we have noted, Board abstention under § 10(k) in favor of an arbitration agreement is accompanied by injunctive relief to maintain the status quo pending the conducting of the arbitration and the enforcement of the award. And the pattern we find in the Act avoids a lack of mutuality since the employer cannot interfere with arbitration on the ground that he desires to permit the Board to conduct a proceeding and issue an order that he is not obligated to observe.

Accordingly the petition to review is granted; the petition for enforcement is denied; and the Board's order of June 27, 1968, 172 NLRB No. 77 is set aside.

So ordered.

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be applicable to any subsequent 10(k) decision, for the Board would be on notice of the infirmity. See Zuber v. Allen, 396 U.S. 168, 197 (1969). As to the applicability of our ruling to decisions previously issued by the Board, we do not clearly discern the possible shape of the problem, and therefore we defer decision on what course will best effectuate the Federal labor policy contemplated by Congress.

MACKINNON, *Circuit Judge*, dissenting: Since its amendment over twenty years ago, the decisions of the National Labor Relations Board [1] (NLRB) and

[1] United Brotherhood of Carpenters, etc., Local 581 (Ora Collard), 98 NLRB 346, 348-349 (1952); Int'l Union of Operating Engineers (Empire State Painting Co.), 99 NLRB 1481, 1484-1486 (1952); International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Pittsburgh Plate Glass Co.), 125 NLRB 1035, 1038-1039 (1959); United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, 108 NLRB 186, 197 (1954); Millwrights Local 1102, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (General Riggers and Erectors, Inc.), 127 NLRB 26, 29 (1960); Newspaper and Mail Delivers' Union (News Syndicate Co.), 141 NLRB 578, 580 (1963); International Union of Operating Engineers, Local 66 (Frank P. Badolato & Son), 135 NLRB 1392, 1395-1396 (1962); Local 173, Wood, Wire and Metal Lathers' International Union, AFL-CIO (Newark and Essex Plastering Co.), 121 NLRB 1094, 1103-1104 (1958); Bay Counties District Council of Carpenters, Inc., 115 NLRB 1757, 1766-1767 (1956); Local 450, International Union of Operating Engineers (Sline Industrial Painters), 119 NLRB 1725, 1731 (1958), enforced, 275 F.2d 408 (5th Cir. 1960); Local 825, Int'l Union of Operating Engineers (Nichols Electric), 137 NLRB 1425, 1428-1429 (1962), enforced, 326 F.2d 213 (3d Cir. 1964); Local 964, United Brotherhood of Carpenters (Carleton Bros.), 141 NLRB 1138, 1142 (1963); Local 68, Wood, Wire & Metal Lathers, etc. (Acoustics & Specialties, Inc.), 142 NLRB 1073, 1076 (1963); Local 825, Int'l Union of Operating Engineers (Schwerman Co. of Pa., Inc.), 139 NLRB 1426, 1429 (1962); Carpenters District Council of Denver Inc. (J. O. Veteto & Son), 146 NLRB 1242, 1245 (1964); Electrical Workers, Local 26, etc. (McCloskey & Co.), 147 NLRB 1498, 1501-1503 (1964); Carpenters Local Union No. 1622 (O. R. Karst), 139 NLRB 591, 594 (1962); Operative Plasterers Local No. 65 (Twin City Tile & Marble Co.), 152 NLRB 1609 (1965); Local 300, United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (D'Annunzio Bros., Inc.), 155 NLRB 836 (1965).

the federal courts[2] have assumed that the National Labor Relations Act requires both the employer and the unions charged with committing an unfair labor practice under section 8(b) (4) (D)[3] agree to be bound by an arbitration before the N.L.R.B may be

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[2] *See* New Orleans Typographical Union No. 17 v. N.L.R.B., 368 F.2d 755, 763 (5th Cir. 1966); N.L.R.B. v. Local 825, International Union of Operating Engineers, AFL-CIO (Nichols Electric Co.), 326 F.2d 213, 216 (3rd Cir. 1964); Local 450, International Union of Operating Engineers, AFL-CIO (Sline Industrial Painters) v. Elliott, 256 F.2d 630, 636 (5th Cir. 1958). *See also* Carey v. Westinghouse Electric Corp., 375 U.S. 261, 264 (1963), citing Wood, Wire & Metal Lathers Union, 119 NLRB 1345, 1347 (1958).

[3] The unfair labor practice is defined by § 8(b) (4) (D) which provides:

> It shall be an unfair labor practice for a labor organization or its agents—
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> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting Commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. 29 U.S.C. § 158(b) (4) (D).

divested by section 10(k)[4] of jurisdiction to hear and decide the issue.

The majority opinion here would reverse all these administrative and court decisions and hold that the NLRB has no jurisdiction to decide such disputes where the two unions invloved are members of the AFL Building and Construction Trades Department if both have agreed to be bound by the decisions of the National Joint Board for the Settlement of Jurisdictional Disputes (Joint Board)[5] established by that labor organization.

In this case the NLRB found that Plasterers Union committed an unfair labor practice under section 8(b) (4) (D), but the majority opinion would sustain the Plasterers' claim that the NLRB was without jurisdiction to hear and determine the dispute because the two unions (Plasterers and Tile Setters) had agreed upon a voluntary method of adjusting the

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[4] Section 10(k) provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed. 29 U.S.C. § 160(k).

[5] This board was created pursuant to an agreement of October 17, 1949 by the Building and Construction Trades Department of the AFL, the Participating Specialty Contractors Employers' Association and the Associated General Contractors of America, Inc. *See* 53 GEO. L.J. 130 n.198 (1964).

dispute notwithstanding the fact that the employers had not agreed to be bound by such decision. The principal contention of the Plasterers, which is sustained by the majority opinion, is that the employers' consent to be bound by such decision is not required under section 10(k).

The NLRB contends the employers are parties to the dispute and since it is admitted they have not agreed to be bound by the Joint Board determination of the dispute between the two unions that the NLRB is empowered and directed to make a binding determination of the dispute that will be controlling upon all the parties. The majority opinion bases its decision upon (1) alleged legislative history and (2) a single sentence in a 1961 Supreme Court decision. Both of these grounds have a similar cast to them as both involve isolated comments addressed to describing the garden variety of jurisdictional disputes and neither were in any way addressed to the problem that is before the court here of the NLRB's power and duty to adjudicate unfair labor practices caused by jurisdictional strikes in violation of section 8(b) (4) (D). See section 10(a).

In asserting reliance on the legislative history, petitioner cites the article in 52 GEORGETOWN LAW JOURNAL 314 by counsel in this case. This article published in 1964 favored the Joint Board approach to jurisdictional disputes and it has spawned several later articles that adopt the same thesis that somehow the legislative history of section 10(k) supports the position here asserted on behalf of the Joint Board. The majority opinion adopts this argument. The feature of the "legislative history" that is relied upon to bring about this result is stated in the GEORGETOWN LAW JOURNAL article to be:

> Certainly, the literal meaning of section 10(k) does not require the employer to be a party to a settlement of a jurisdictional dispute,[6] and *the legislative history of the Act makes no mention whatsoever of employer's participation in private settlements under section 10(k)*. 52 GEO. L.J. 314, 332 (1964) (emphasis added).

In support of the italicized statement the article in a footnote cites five instances when Senators and Congressmen discussed jurisdictional disputes or strikes and did not mention employers' participation in private settlements under section 10(k). There is nothing exceptional about this and it has absolutely no bearing on the issue here. The fact that Congress did not discuss employer participation does not in any way indicate any congressional intent on the matter.

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[6] Actually, the literal meaning of § 10(k) deals only with jurisdictional strikes against an employer and does not concern itself with jurisdictional disputes between unions. So long as jurisdictional disputes are confined to unions the NLRB has no jurisdiction under § 10(k). It is only when an unfair labor practice involves an employer through a jurisdictional strike that the NLRB has any jurisdiction. *See* Justice Douglas' opinion in Carey v. Westinghouse Corp., *supra*, 375 U.S. at 263-264. Senator Taft made this same point on June 21, 1947 in a radio address. He was addressing himself to the handling of jurisdictional disputes under § 10(k) after that section had attained its present form. He said:

> The President says the bill would force unions to strike if they wish to have a jurisdictional dispute settled by the National Labor Relations Board. This is not so. All the union has to do is to file a petition under the representation section. *How could this provision increase strikes when it is not effective at all until there is already a jurisdictional strike or secondary boycott in effect?* (Emphasis added). 2 *Legislative History Labor Management Relations Act* 1947, p. 1627.

The members of Congress just did not address themselves to the point. In addition, there is a very good reason they did not address themselves to the point and that was because at the time four of the five remarks were made, section 10(k) was not in its present form. The bill originated in the House and at that stage it merely defined jurisdictional strikes and made them unlawful. Section 10(k) was not then in the bill. This treatment of jurisdictional strikes was supplanted in the Senate bill by a section 10(k) the principle provision of which empowered and authorized the NLRB to appoint an arbitrator to hear and determine such disputes. This provision for the NLRB appointment of an arbitrator was removed in the Conference Committee and section 10(k) then for the first time assumed is present character. Thus, the failure of the five members of Congress to discuss 10(k) in its present form is explained by the fact that the bill did not reach its present form until after their quoted remarks. While the 10-day provision was always a part of 10(k) from the time it emerged in the Senate bill it attracted no notice because it was always over-shadowed by the provision for the Board to appoint an arbitrator.

This explains why the members of Congress in four out of five instances cited did not even consider the issue we have here.[7]

However, Senator Morse did discuss section 10(k) after it had achieved its present form and he interpreted the provision as requiring the NLRB to decide jurisdictional disputes. Speaking on the Senate floor

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[7] *See Legislative History Labor Management Relations Act* 1947, Representative Hartley 615, Senator Morse 950, Senator Taft 1012, Senator Murray 1046, Senator Smith 1157.

on June 4, 1947 on the bill as reported by the House and Senate Conferees, Senator Morse said:

> I am especially disturbed about the amendment made in conference *which requires the Board itself*, rather than an arbitrator, *to decide these jurisdictional disputes.* I think the provision is completely unworkable. Under the provision *the Board will have to hear and decide the merits of the disputes* in the motion-picture industry and the controversy of over 50 years' standing between the teamsters and brewery workers unions, to mention only a few.[8] (Emphasis added). 2 *Legislative History of the Labor Management Relations Act*, 1947, p. 1554.

So the "legislative history" relied upon by the petitioner is not helpful and to the extent that the remarks of Senator Morse on June 5, 1947 may be considered to be in this category, they are adverse to petitioners. The truth of the matter is that the legisislative history of section 10(k) does not afford any substantial assistance to its interpretation and the weakness of the majority opinion is demonstrated by its assertion that it does.

The Supreme Court decision is *NLRB* v. *Radio and Television Broadcast Engineers Union* [*CBS*], 364 U.S. 573 (1961), and the single sentence in that opinion which the majority opinion here relies upon comments upon a clause in section 10(k), as follows:

> [T]he clause "the dispute out of which such unfair labor practice shall have arisen" can have no other meaning except a jurisdictional dispute under § 8(b) (4) (D) which is a dispute be-

[8] He did not address himself to the problem which arises under the Joint Board here. *See* note 5 *supra.*

> tween two or more groups of employes over which is entitled to do certain work for an employer. 364 U.S. at 579.

Since neither the legislative history nor this sentence in the CBS decision addressed the problem here being considered, neither furnish any support for the conclusion reached by the majority opinion. The comments quoted in the legislative history and in *CBS* are correct as far as they go, but they do not touch the issue here. They are merely comments taken out of context and misapplied.

Another feature of the majority opinion that obscures the issue is its overemphasis on the "jurisdictional dispute" here involved and its underemphasis on the fact that the dispute had ripened into a jurisdictional strike against an employer and that based upon such conduct, unfair labor practice charges had been filed with the NLRB.

No person needs any support for the proposition that the most ordinary union jurisdictional dispute primarily involves the unions concerned but that conclusion does not support the finding that the employer is not a very vital party to a jurisdictional strike arising out of that underlying dispute and which subsequently becomes the subject of an unfair labor practice charge. The unions by their actions have made him a party to their dispute and the statute recognizes this fact. Also, the fact that the Joint Board has employer groups in its structure, indicates that employers do have a direct interest in their decisions.

The words "such dispute" in section 10(k) *refer to the dispute out of which the unfair labor practice arose* and the statute provides that is the jurisdictional *strike* in which the striking union attempts to force the employer to assign particular work to em-

ployees in its union. There is no question that the employer is a party to that dispute. In fact, an employer is a necessary party to any dispute involving an unfair labor practice under section 8(b) (4) (D) by its very definition. Clearly the unfair labor practice arises out of the *strike*. More remotely the jurisdictional strike in many cases arises out of the jurisdictional *dispute*[9] but no unfair labor practice charge under section 8(b) (4) (D) ever arose solely out of a jurisdictional dispute between two unions. It requires "a strike" that involves an employer as one party.

Moreover, there are several interesting references to the interests of employers in jurisdictional disputes. The article in 52 GEORGETOWN LAW JOURNAL 314 on Jurisdictional Disputes cited in the majority opinion recognizes at pp. 320-21 that ". . . an employer is not necessarily a neutral party unconcerned with which group performs the work . . . ." Also, in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261 (1964), Justice Douglas discusses jurisdictional disputes and points out several ways in which they may involve employers:

> We have here a so-called "jurisdictional" dispute involving two unions *and* the employer. But the term "jurisdictional" is not a word of a single meaning. In the setting of the present case this "jurisdictional" dispute could be one of two different, though related, species: either—(1) a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another; or (2) a controversy as to which union should represent the employees do-

[9] This more remote dispute was what Justice Black was referring to in the *CBS* case, *supra* at 579.

> ing particular work. If this controversy is considered to be the former, *the National Labor Relations Act* (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 *et seq.*) *does not purport to cover all phases and stages of it.* While § 8(b) (4) (D) makes it an unfair labor practice for a union to strike to get an employer to assign work to a particular group of employees rather than to another, *the Act does not deal with the controversy anterior to a strike nor provides any machinery for resolving such a dispute absent a strike.*
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> The Act and its remedies for "jurisdictional" controversies of that nature come into play only by a strike or a threat of a strike. *Such conduct gives the Board authority under § 10(k) to resolve the dispute.* 375 U.S. at 263-264. (Emphasis added).

I find Justice Douglas' approach to this portion of the Act to be more reasonable than the finespun theory advanced in the majority opinion. After all, we are here faced with what all admit is an unfair labor practice that has been committed in violation of section 8(b) (4) (D). In such circumstances, section 10(k) should be read in conjunction with section 10(a) which provides:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. *This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise* . . . . (Emphasis added). 29 U.S.C. § 160(a).

In carrying out the various duties imposed upon it by Congress the NLRB has followed a policy for twenty years which favors and encourages the unions to settle their own differences by themselves. Even when a union starts a jurisdictional strike in violation of section 8(b) (4) (D), the NLRB will quash the proceedings under 10(k) if either union renounces any claim to the work.[10] It is only when the dispute is protracted that the NLRB carries out the regular hearing as directed by section 10(k).[11] This is a recognition of the changed status of the dispute which occurs when one or both unions enlarge the dispute between themselves to include the employer by engaging in a strike against that employer in an attempt to obtain an advantage over their rival union.[12]

Such procedure by the NLRB must be considered to be a sound interpretation and application of the powers conferred upon it by the Act. The sound discretion they exercise in such matters also finds support in that provision of section 10(k) which requires the parties to

> ". . . submit to the Board *satisfactory evidence* that they have adjusted, or agreed upon methods for the voluntary *adjustment* of, the dispute. . . ." (Emphasis added).

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[10] *See* Local 1905, Carpet, Linoleum & Soft Tile Layers (Southwestern Floor Co.), 143 NLRB 251, 255-256 n.7 (1963).

[11] This is the representation in the NLRB brief as to agency policy.

[12] In New Orleans Typographical Union No. 17 v. N.L.R.B., 368 F.2d 755, 767 (5th Cir. 1966), the court remarked:

> When the Union struck to enforce the work assignment it removed the controversy from the field of private contractual rights into the higher ambit of public rights.

It also made the employer a party to the dispute.

"Satisfactory evidence . . . [of] adjustment" to whom? Obviously to the NLRB. This vests the NLRB with discretion in the matter. This discretion is weighed against the overriding duty imposed on the NLRB to prevent any unfair labor practice and to exercise that power unaffected "by any other means of adjustment." § 10(a). This places a heavy responsibility upon the NLRB in a section 8(b) (4) (D) proceeding to determine that the settlement procedure is going to be effective to adjust the unfair labor practice (not just the jurisdictional dispute) before it discusses the charge. I thus find the majority opinion that strikes at the heart of this procedure to be an unreasonable interpretation of the Act and find much more reasonable the 20-year administrative interpretation that has been placed by the Board upon these sections of the Act.

The Board's interpretation of its duties in these jurisdictional disputes has been regularly reported to Congress [13] and Congress has left section 10(k) unchanged even though it has made extensive revisions of the Act since 1947. It amended both sections (j) and (*l*) as well as 8(b) (4) (D) in 1959. Under such circumstances Congress is deemed to have accepted the construction placed on section 10(k) by the Board [14] and under such circumstances it is well settled

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[13] *See, e.g.*, Twentieth Annual Report of the National Labor Relations Board (G.P.O., 1956), p. 118; Twenty-first Annual Report of the National Labor Relations Board (G.P.O., 1957), p. 119; Twenty-third Annual Report of the National Labor Relations Board (G.P.O., 1959), pp. 101-102.

[14] Labor Board v. Gullett Gin Co., 340 U.S. 361, 366 (1951). Such interpretation does not assign conclusive weight to congressional inaction. (*See* Boys Markets, Inc. v. Retail Clerk's Union, —— U.S. —— (June 1, 1970), cited by the majority opinion at page 21). It merely points to the failure or refusal of

that the contemporaneous construction of the statute by the agency charged with its administration and enforcement should be sustained.[15] I accordingly dissent from the majority opinion that would overturn long-standing Board practices.

Congress to amend this section when it was amending subsections on both sides of it as one factor in conjunction with the contemporaneous construction of the Act by the NLRB over 23 years, the provisions of the Act itself including section 10(a) and Mr. Justice Douglas' opinion in Carey v. Westinghouse Corp., *supra*, wherein he points out that "there is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award," as pointing to a conclusion that the Act is not to be construed in the manner the majority opinion states. These are all indicia of congressional intent and that is the principle here relied upon; not *stare decisis* as in Boys Markets, Inc.

[15] Udall v. Tallman, 380 U.S. 1,. 16-17 (1965); F.T.C. v. Mandel Bros., Inc., 359 U.S. 385, 391 (1959); NLRB v. Coca-Cola Bottling Co., 350 U.S. 264, 269 (1956); Commissioner v. Estate of Sternberger, 348 U.S. 187, 199 (1955); United States v. Public Utilities Commission of California, 345 U.S. 295, 314-315 (1953); Union Mfg. Co. v. NLRB, 95 U.S.App. D.C. 252, 221 F.2d 532, 536, *cert. denied*, 349 U.S. 921 (1955), and cases there cited; West Texas Utilities Co. v. NLRB, 87 U.S.App.D.C. 179, 181, 184 F.2d 233, 235 (1950), *cert. denied*, 341 U.S. 939 (1951).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1969

No. 22,073

(United States Court of Appeals for the District of Columbia Circuit Filed Jun 30, 1970 Nathan J. Paulson, Clerk)

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

TEXAS STATE TILE & TERRAZZO CO., INC., ET AL., AND LOCAL UNION 20 BRICKLAYERS ETC., LOCAL UNION 108 INT'L. ASSOC. OF MARBLE ETC. POLISHERS, ET AL., INTERVENORS

On Petition to Review and Cross-Petition to Enforce an Order of the National Labor Relations Board

Before: McGowan, Leventhal, and MacKinnon, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the petition for review is hereby granted; the petition to enforce is denied; and the order of the National Labor Relations Board on review herein (172 NLRB No. 77, June 27, 1968) is hereby set aside.

Per Curiam

For the Court:

NATHAN J. PAULSON, Clerk

By:

Hugh E. Kline
Chief Deputy Clerk

Dated: June 30, 1970.

Opinion per Circuit Judge Leventhal.
Separate dissenting opinion by Circuit Judge MacKinnon.

A true copy:

Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
for the District of Columbia Circuit.

By: Dorothy E. Long, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1970

No. 22,073

(United States Court of Appeals for the District of Columbia Circuit Filed Oct. 1, 1970
Nathan J. Paulson, Clerk)

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

TEXAS STATE TILE & TERRAZZO CO., INC., ET AL., AND LOCAL UNION 20 BRICKLAYERS ETC., LOCAL UNION 108 INT'L. ASSOC. OF MARBLE ETC. POLISHERS, ET AL., INTERVENORS

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges; in Chambers.

ORDER

On consideration of respondent's petition for rehearing and suggestion for rehearing *en banc* and of intervenor's petition for rehearing and suggestion for rehearing *en banc*, and it appearing that there is not a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED by the Court that the aforesaid petitions for rehearing and suggestions for rehearing *en banc* are denied.

Per Curiam

A true copy:

Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
for the District of Columbia Circuit.

By: Elisabeth E. Namuth, Deputy Clerk

Circuit Judge Wright did not participate in the foregoing order.

Circuit Judge MacKinnon would grant the respondent's and intervenor's suggestions for rehearing *en banc* for the reasons set forth in his dissenting opinion.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 23-CD-133

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF HOUSTON, TEXAS

and

SOUTHWESTERN CONSTRUCTION COMPANY

Case No. 23-CD-137

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF HOUSTON, TEXAS

and

MARTINI TILE AND TERRAZZO COMPANY [1]

DECISION AND ORDER

Upon charges filed on January 30, 1967, and February 7, 1967, by Southwestern Construction Com-

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[1] On October 10, 1967, Associate Chief Trial Examiner Charles W. Schneider granted a motion for intervention to the following organizations: Bricklayers, Masons and Plasterers International Union of America; International Association of Marble, Slate, and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters' Helpers, and Marble Mosaic and Terrazzo Workers' Helpers; and Tile Contractors' Association of America, Incorporated.

pany, herein called Southwestern, and on March 17, 1967, by Martini Tile and Terrazzo Company, herein called Martini, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 23, issued a complaint on September 14, 1967 against Plasterers Local Union No. 79, Operative Plasterers and Cement Masons International Association of Houston, Texas, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(b) (4) (i) and (ii) (D) of the National Labor Relations Act, as amended. In substance, the complaint alleges that the Respondent violated the Act by engaging in picketing and other activities at the M. D. Anderson Library project, Houston, Texas, and at the Rainbo Baking Company, Houston, Texas, with an object of forcing or requiring Southwestern and/or its subcontractor, Texas State Tile and Terrazzo, Inc., herein called Texas Tile, and Martini, to assign the work of applying to walls a coat of Portland cement mortar upon which tile was to be installed to employees represented by the Respondent, rather than to employees represented by Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America, AFL-CIO, herein called the Tile Setters. The Respondent filed an answer admitting certain allegations of the complaint and denying certain other allegations.

On October 30, 1967, at a hearing held pursuant to the Complaint and Notice of Hearing, the parties agreed to submit this proceeding directly to the Board for the issuance of findings of fact, conclusions of law, and a Decision and Order. It was agreed that the entire record in this case shall consist of: The Decision and Determination of Disputes, the tran-

script of testimony, exhibits, and formal papers in the prior 10(k) proceeding,[2] and the transcript, exhibits and formal papers in the present proceeding. The parties waived a hearing before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, and the issuance of a Trial Examiner's Decision. On April 22, 1968 the General Counsel filed a Motion to Transfer Case to the Board. On April 24, 1968, the Board granted the motion.[3]

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Briefs were filed by the Respondents, and jointly by Texas Tile, Martini, the Tile Setters and the Intervenors, which have been duly considered.

Upon the entire record in these cases, the Board makes the following:

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[2] On August 22, 1967, in a proceeding pursuant to Section 10(k), the Board issued its Decision and Determination of Disputes (167 NLRB No. 23), in which the Board concluded that employees of Texas Tile and Martini represented by the Tile Setters were entitled to perform the work in dispute. At no time since the issuance of the Board's Decision and Determination of Disputes has the Respondent given written notification to the Regional Director for Region 23 that it would refrain from forcing or requiring Texas Tile and/or Martini, by means proscribed in Section 8(b)(4)(D), to assign the work in dispute to plasterers rather than tile setters.

[3] Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

Findings of Fact

1. *The businesses of the Employers.*

The parties stipulated that:

A. Texas Tile, a Texas corporation with its principal office and place of business located in Houston, Texas, is engaged in the business of installing tile and terrazzo. During the 12-month period prior to the hearing Texas Tile purchased and received goods, materials, and supplies valued in excess of $50,000, which materials were shipped from points outside the State of Texas directly to Texas Tile at points within the State of Texas.

B. Martini, a Texas corporation with its principal office and place of business located in Houston, Texas, is engaged in the business of installing tile and terrazzo. During the 12-month period prior to the hearing Martini purchased and received goods, materials, and supplies valued in excess of $50,000, which materials were shipped from points outside the State of Texas directly to Martini at points within the State of Texas.

We find that Texas Tile and Martini are engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

2. *The labor organizations involved.*

The parties stipulated, and we find, that the Plasterers and the Tile Setters are labor organizations within the meaning of Section 2(5) of the Act.

3. *The Unfair Labor Practices.*

A. *The M. D. Anderson Library Job*

In 1965, Southwestern, a general contractor, entered into a contract with the University of Houston

to construct an addition to the M. D. Anderson Library. Southwestern let a subcontract for the tile and terrazzo work to Texas Tile, which commenced work in August 1966. Texas Tile has a collective-bargaining agreement with the Tile Setters and assigned the work to employees represented by the Tile Setters. At the outset of work in August 1966, the Tile Setters began to apply a coat of Portland cement mortar to receive tile. The Respondent claimed the work. The matter was sent to the National Joint Board for the Settlement of Jurisdictional Disputes. On November 10, 1966, the Joint Board rendered a decision awarding the disputed work to the Respondent. Texas Tile was not bound by the Joint Board decision. The record shows, and we find, that thereafter, the Respondent, through its representative, George Gongshore, made several attempts to obtain the work in question but Texas Tile and the Tile Setters refused to accede to its demands. On January 24, 1967, the Respondent established a picket at the jobsite. The picket sign read as follows:

> Plasterers Local 79 protest the refusal of Texas State Tile and Terrazzo to comply with the National Joint Board. Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or concerted refusal to work.

In fact, all crafts working on the job honored the picket, causing a complete work stoppage. The picket was removed after an injunction was granted by the United States District Court for the Southern District of Texas, Houston Division, on February 20, 1967. We further find that the Respondent engaged in such picketing with an object of forcing or requiring Texas Tile to change the assignment of the dis-

puted work from its own employees, who were members of or represented by the Tile Setters, to employees who were members of or represented by the Respondent.

B. *The Rainbo Job.*

Martini has a contract with the Rainbo Baking Company in Houston, Texas, to furnish labor and materials for the installation of ceramic tile. Martini delivered its materials to the jobsite on or about March 14, 1967, and began work the next day. Martini has a collective-bargaining agreement with the Tile Setters and assigned the work in dispute to employees represented by the Tile Setters.

On the morning of March 17, 1967, the Respondent established a picket line at the jobsite. The picket sign read as follows:

> Plasterers Local No. 79, protests substandard conditions Martini Tile Co., Inc., Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or a concerted refusal to work.

Shortly after the establishment of the picket, officials of Rainbo requested Martini to remove its employees from the premises. Martini complied and a work stoppage ensued. Thereafter, the Respondent removed the picket and picketing was not resumed although Martini returned and continued work on the job. Respondent has stipulated, and we find, that the Respondent engaged in such picketing with an object of forcing or requiring Martini to change the assignment of the disputed work from its own employees, who were members of or represented by the Tile Setters, to employees who were members of or represnted by the Respondent.

C. *Respondent's Contentions*

The Respondent's defense herein, as argued in its brief, is in the nature of a request for reconsideration of the Board's Decision and Determination of Disputes issued in the 10(k) proceeding. It argues, *inter alia*, that the word "parties" as used in Section 10(k) does not mean the employer and the two unions or groups of employees claiming the work in dispute need agree upon a method for the voluntary adjustment of the dispute for the Board to quash the Notice of Hearing, but only that the two Unions or groups of employees need agree upon such a method of adjustment, and that since Respondent and the Tile Setters are both subject to the Joint Board's jurisdiction, the Notice of Hearing should have been quashed. We reiterate, however, our consistent interpretation of Section 10(k) that the employer controlling the work assignment as well as the rival unions involved comprise the "parties to such dispute," and all must approve and enter into a voluntary adjustment procedure in order to preclude a hearing and determination pursuant to that Section.[4] Moreover, we note that the Board's longstanding interpretation of this aspect of Section 10(k) was neither questioned nor disturbed when the National Labor Relations Act was most recently amended by Congress in 1959. Accordingly, we find no merit in this contention of the Respondent. We have examined the re-

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[4] *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 428, AFL (Philadelphia Association)*, 108 NLRB 186, 195-8, Local 450, *and Joiners of America, Local 1622 (O. R. Karst)*, 139 NLRB 591. See also our Decision in the prior 10(k) proceeding, 167 NLRB No. 23, and the cases cited in footnote No. 4 therein.

maining arguments in support of the Respondent's position, and also find nothing therein which was not previously considered by the Board. We perceive no reason for disturbing the prior Decision and Determination of Disputes.[5]

On the basis of the foregoing facts, and the entire record in these cases, we find that the Respondent's picketing of the M. D. Anderson and Rainbo projects as described above was for a proscribed object and in violation of Section 8(b) (4) (i) and (ii) (D).

4. *The Effect of the Unfair Labor Practices Upon Commerce.*

The activities of the Respondent set forth in section 3, above, occurring in connection with the operations of the Employers set forth in section 1, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

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[5] By motions made on February 21, 1968, "To Correct Record on Material Omissions," and on May 22, 1968, "To Correct 10(k) Record on Material Misstatement", Texas Tile, Martini and the Tile Setters seek to supplement the 10(k) record with various evidentiary matter that is in the nature of new evidence, which is not shown to be newly discovered and previously unavailable. It is clearly not a "correction" of the 10(k) record, or a supplying of evidence to fill an obvious omission in the record. The motions are hereby denied. Previously, on January 17, 1968, the Board denied a "Motion to Re-open 10(k) Record on Issuance of Nationwide Order" filed by the Tile Setters and the two employers, on the ground, *inter alia*, that the assertion that the evidence offered therein was newly discovered and previously unavailable was unsupported.

5. *The Remedy.*

Having found that the Respondent violated Section 8(b) (4) (i) and (ii) (D) of the Act, we shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Conclusions of Law

1. Texas Tile and Martini are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent and the Tile Setters are labor organizations within the meaning of Section 2(5) of the Act.

3. By its picketing at the M. D. Anderson Library job, Houston, Texas, with an object of forcing or requiring Texas Tile to assign certain work (applying to walls a coat of Portland cement mortar upon which tile was to be installed) to employees represented by the Respondent rather than to employees represented by the Tile Setters, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b) (4) (i) and (ii) (D) of the Act.

4. By its picketing of the Rainbo Baking Company job, Houston, Texas, with an object of forcing or requiring Martini to assign certain work (applying to walls a coat of Portland cement mortar upon which tile was to be installed) to employees represented by the Respondent rather than to employees represented by the Tile Setters, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b) (4) (i) and (ii) (D) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent Plasterers Local Union No. 79, Operative Plasterers and Cement Masons International Association of Houston, Texas its officers, agents, and representatives shall:

1. Cease and desist from engaging in, or inducing or encouraging individuals employed by Texas State Tile and Terrazzo, Inc., or Martini Tile and Terrazzo Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any materials or to perform any services; and from threatening, coercing, or restraining the aforesaid persons, where an object in either case is to force or require Texas State Tile and Terrazzo, Inc., or Martini Tile and Terrazzo Company, to assign the work of applying to walls a coat of Portland cement mortar upon which tile is to be installed at the M. D. Anderson Library and Rainbo jobs, to employees represented by the Respondent rather than to employees represented by Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America, AFL-CIO.

2. Take the following affirmative action the Board finds will effectuate the policies of the Act:

(a) Post at its business offices, meeting halls and all other places where notices to employees are customarily posted, in Houston, Texas, copies of the at-

tached notice marked "Appendix".* Copies of said notice, on forms provided by the Regional Director for Region 23, shall, after being duly signed by the Union's representative, be posted by the Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail copies of said notice to the Regional Director for Region 23 for posting by Texas State Tile and Terrazzo, Inc., and Martini Tile and Terrazzo Company, the Companies willing, at locations where notices to its employees are customarily posted.

(c) Notify the Regional Director for Region 23, in writing, within 10 days from the date of this order, what steps have been taken to comply herewith.

Dated, Washington, D. C.

John H. Fanning, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

* In the event that this order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decision of the United States Court of Appeals, Enforcing an Order."

APPENDIX

NOTICE TO ALL OUR MEMBERS PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT engage in, or induce or encourage individuals employed by Texas State Tile and Terrazzo, Inc., or Martini Tile and Terrazzo Company, or any other person engaged in commerce, or in an industry affecting commerce, to engage in, a strike or refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any materials, or to perform any services; or threaten, coerce, or restrain the aforesaid persons, where an object in either case is to force or require Texas State Tile and Terrazzo, Inc., or Martini Tile and Terrazzo Company, to assign the work of applying to walls a coat of Portland cement mortar upon which tile is to be installed, at the M. D. Anderson Library job or at the Rainbo Baking Company, Houston, Texas, to employees represented by this Union, rather than to employees represented by Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America, AFL-CIO.

PLASTERERS LOCAL UNION NO. 79,
OPERATIVE PLASTERERS AND CEMENT
MASONS INTERNATIONAL ASSOCIATION
OF HOUSTON, TEXAS
(Labor Organization)

Dated..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, Houston, Texas 77002, (Tel. No. 228-4296), if they have any questions concerning this notice or compliance with its provisions.

APPENDIX D

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 23-CD-133

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF HOUSTON, TEXAS

and

SOUTHWESTERN CONSTRUCTION COMPANY

Case No. 23-CD-137

PLASTERERS LOCAL UNION NO. 79, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF HOUSTON, TEXAS

and

MARTINI TILE AND TERRAZZO COMPANY

DECISION AND DETERMINATION OF DISPUTES

This is a consolidated proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Southwestern Construction Company, herein called Southwestern, and Martini Tile and Terrazzo Company, herein called Martini, alleging violations of Section 8(b)(4)(D) of the Act by Plasterers Local Union No. 79, Operative

Plasterers and Cement Masons International Association of Houston, Texas, herein called the Plasterers. Pursuant to notice, a hearing was held on April 6, 7, 10, 11, 12, 13, and 14, 1967, before Donald H. Hicks, Hearing Officer. Southwestern, Martini, the Plasterers, Texas State Tile and Terrazzo, Inc., herein called Texas Tile, and Tile, Terrazzo and Marble Setters Local Union No. 20, herein called the Tile Setters, appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The rulings of the Hearing Officer made at the hearing are free from prejudicial error and are hereby affirmed. All parties filed briefs which have been duly considered.

Upon the entire record in these cases, the Board makes the following findings:

1. *The businesses of the Employers.*

The parties stipulated that:

A. Texas Tile, a Texas corporation with its principal office and place of business located in Houston, Texas, is engaged in the business of installing tile and terrazzo. During the 12-month period prior to

[1] The Plasterers and the Tile Setters are parties to the dispute. While Southwestern is the Charging Party in Case No. 23-CD-133, Texas Tile intervened as the employer that assigned the work in that case to the Tile Setters. It participated jointly with Martini and the Tile Setters.

the hearing, Texas Tile purchased and received goods, materials, and supplies valued in excess of $50,000, which materials were shipped from points outside the State of Texas directly to Texas Tile at points within the State of Texas.

B. Martini, a Texas corporation with its principal office and place of business located in Houston, Texas, is engaged in the business of installing tile and terrazzo. During the 12-month period prior to the hearing, Martini purchased and received goods, materials, and supplies valued in excess of $50,000, which materials were shipped from points outside the State of Texas directly to Martini at points within the State of Texas.

We find that Texas Tile and Martini are engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

2. *The labor organizations involved.*

The parties stipulated, and we find, that the Plasterers and the Tile Setters are labor organizations within the meaning of Section 2(5) of the Act.

3. *The dispute.*

A. The work in dispute is the application to walls of a coat of Portland cement mortar upon which tile was to be installed.

B. *The basic facts.*

Case No. 23-CD-133

In 1965, Southwestern, a general contractor, entered into a contract with the University of Houston to construct an addition to the M. D. Anderson Library. Southwestern let a subcontract for the tile

and terrazzo work to Texas Tile, which commenced work in August 1966. Texas Tile has a collective-bargaining agreement with the Tile Setters and assigned the work to employees represented by the Tile Setters. At the outset of work in August 1966, the Tile Setters began to apply a coat of Portland cement mortar to receive tile. The Plasterers claimed the work. The matter was sent to the National Joint Board for the Settlement of Jurisdictional Disputes. On November 10, 1966, the Joint Board found that "the work in dispute is governed by the agreement of August 22, 1917, and shall be assigned to Plasterers, except that any coat to be applied wet the same day under tile shall be placed by the Tile Setters. In the thin-set or adhesive method of applying tile to walls and ceilings, the Plasterers shall apply the first and second coats of mortar, that is the scratch coat and plumb coat. The Plasterers shall plumb, rod and square all walls, rod and level all ceilings and the Tile Setters shall apply the final setting bed for the Tile." Texas Tile was not bound by the Joint Board decision.

Thereafter, the Plasterers made several attempts to obtain the work in question but the Tile Setters refused to accede to their demands. On January 24, 1967, the Plasterers established a picket at the jobsite. The picket sign read as follows: "Plasterers Local 79 protest the refusal of Texas State Tile and Terrazzo to comply with National Joint Board. Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or concerted refusal to work." All crafts working on the job honored the picket. The picket was removed after an injunction was granted by the United States District Court for the Southern District of Texas, Houston Division, on February 20,

1967. The work in dispute was completed by the Tile Setters.

The immediate work involved at the time of the picketing was the application of a second coat of Portland cement mortar (in the stairwell area) upon which quarry tile was to be installed. The Plasterers had applied a scratch coat of plaster (agreed to be Plasterers' work). Then the disputed second coat (called the ""brown coat" by the Plasterers or the "float coat" or "setting bed" by the Tile Setters) was applied by the Tile Setters. Both unions claim this latter coat as their own work.

Case No. 23-CD-137

Martini has a contract with the Rainbo Baking Company in Houston, Texas, to furnish labor and materials for the installation of ceramic tile. Martini delivered its materials to the jobsite on or about March 14, 1967, and began work the next day. Martini has a collective-bargaining agreement with the Tile Setters and assigned the work in dispute to employees represented by the Tile Setters.

On the morning of March 17, 1967, the Plasterers established a picket line at the jobsite. The picket sign read as follows: "Plasterers Local No. 79, protests substandard conditions Martini Tile Co., Inc., Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or a concerted refusal to work." Shortly after the establishment of the picket, officials of Rainbo requested Martini to remove its employees from the premises. Martini complied. The Plasterers removed the picket and picketing was not resumed although Martini subsequently returned and completed the job.

The work in dispute is the application of a coat of Portland cement mortar applied directly to metal lathe which was laid over painted brick. The Plasterers contends that this is the "brown coat", which is plasterers' work, while the Tile Setters claims that the coat in question is the "float coat" or "setting bed" which is tile setters' work. The dispute at Rainbo was not submitted to the Joint Board for a decision. Martini filed the charge.

C. *Contentions of the parties.*

The Plasterers admits seeking and demanding, through its representative, George Longshore, assignment of the work in dispute in Case No. 23-CD-133 at a series of meetings with representatives of the Tile Setters, Texas Tile, and Southwestern, but contends it did not violate Section 8(b) (4) (D), as there were no threats to force a change in the assignment of the work in question, and the picket line was established only to protest Texas Tile's refusal to comply with the Joint Board's decision. In any event, it argues, it is entitled to the work on the basis of the skill, relative efficiency, and economy and quality of plasterers' work, area practice, the award made by the Joint Board in the instant case, and an agreement made between the Plasterers' and Tile Setters' International Unions. It argues that plasterers have always been entitled to the last coat of mortar which is plumbed, rodded, and squared to receive tile. It further contends that the recent introduction of dry set mortars has eliminated the tile setters' traditional setting bed in the one coat and thin set methods, and that the last mortar coat before the application of the tile under these new methods can be called the setting bed only if tile is applied while the coat is plastic or wet; a coat of mortar that is allowed to dry is work

properly assigned to plasterers. If the tile is to be applied while this last coat of mortar is still wet or plastic, it does not claim the application of that coat, in the interest of efficiency and economy, since it is serving as a combined conventional setting bed and plumb coat.

The Tile Setters contends [2] that it is entitled to the work in dispute on the basis of the skill, relative efficiency, and economy and quality of tile setters' work; the employer, area, and industry practice; and its contracts with Texas Tile and Martini which explicitly assign the designated work to it. It argues further that it is always entitled to the work of applying the last coat of mortar, which is plumbed, rodded, and squared to receive tile, whether or not that coat is allowed to dry before tile is applied. The Tile Setters admits that it is bound by Joint Board procedures, but contends that the Joint Board award of November 10, 1966, in effect awards the work to it, not to the Plasters. It points out that the award states that the Plasterers is entitled to the work in dispute on the basis of the original (1917) Green Book agreement between the parties, and that that agreement dealt with the conventional or three coat method of plastering and assigned plasterers the work of preparing ceilings and walls for the Tile Setters setting bed. It urges that the advent of dry set mortars and new construction techniques has eliminated work formerly within the jurisdiction of plasterers under the conventional method, and when either the one coat (or float coat) method or the thin set method are employed, the last coat applied *is* the "setting bed", which even the Joint Board recognizes is the tile setters' work.

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[2] Texas Tile and Martini join in the Tile Setters' contentions.

4. *Applicability of the Statute.*

The charges herein allege violations of Section 8(b) (4) (D) of the Act. The record shows, and the Plasterers does not deny, that between August 1966 and January 24, 1967, its representative, George Longshore, sought and demanded from Southwestern and Texas Tile the assignment of plasterers rather than tile setters to the work in dispute in Case No. 27-CD-133, and that on January 24, 1967, a picket was established at the jobsite which caused a work stoppage by all crafts. In Case No. 23-CD-137, the Plasterers concedes, and the record shows, that it established a picket at Rainbo Baking Company, and urged Martini to assign the application of the coat of Portland cement mortar in dispute to plasterers rather than tile setters, and that a temporary work stoppage occurred as a result of the posting of the picket.

We find there is reasonable cause to believe that violations of Section 8(b) (4) (D) have occurred, and that the dispute is properly before the Board for determination under Section 10(k) of the Act.[3]

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[3] The Plasterers contends that, as the parties had agreed upon a voluntary method of adjustment of the dispute, the notice of hearing should be quashed. It argues that Section 10(k) requires only that the unions or groups of employees claiming disputed work agree upon a method of adjustment. We find this contention without merit. The Board has consistently held that the employer who assigned the disputed work must be a party to an agreement that purports to settle an existing jurisdictional dispute. *Local 450 International Union of Operating Engineers (Painting and Decorating Contractors of America, Houston Chapter etc.)*, 119 NLRB 1725; *United Brotherhood of Carpenters and Joiners of America, Local 1622 (O. R. Karst)*, 139 NLRB 591.

5. *The merits of the dispute.*

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to all relevant factors. The following factors are asserted in support of the claims of the parties herein:

A. *Collective-bargaining agreements.*

Texas Tile and Martini have delegated their bargaining authority to the Tile Contractors Association of America, Inc., and to the Tile, Marble and Terrazzo Contractors of Houston, Texas. The Tile Contractors Association of America, Inc. has a collective-bargaining agreement with the Tile Layers International Union which specifically covers work of the type in dispute. The agreement in pertinent part defines tile layers work covered as: "The application of a coat or coats of mortar, prepared to proper tolerance to receive tile on floors, walls and ceiling regardless of whether the mortar coat is wet or dry at the time the tile is applied to it." Texas Tile and Martini, as members of the Tile, Marble, and Terrazzo Contractors of Houston, Texas, are also parties to a collective-bargaining agreement pertaining to local conditions with Tile Setters Union No. 20 which incorporates the above-quoted work coverage provision. Neither Texas Tile nor Martini has any contract with the Plasterers. Texas Tile does not employ plasterers. A representative of Martini testified that on occasion in the past it has hired plasterers to perform work of the type in dispute, but never without direct supervision of a tile setter. There have been no Board certifications bearing on the work in dispute.

B. *Employer, area, and industry practice.*

The record establishes that, with rare exception, Texas Tile and Martini use tile setters to perform the disputed work. Substantial testimony was offered into the record by both the Plasterers and Tile Setters setting out specific construction projects in the area on which their respective crafts performed the work in dispute. Evidence as to industry practice was inconclusive. Though area practice by weight of numbers favors the claim of the Plasterers, in our view this factor is outweighed by other factors favoring the claim of the Tile Setters. Thus, the assignments here of the disputed work to tile setters accords with the practice of the Employers, and is not inconsistent with area or industry practice.

C. *Relative skills and efficiency of operation.*

The Tile Setters contends that tile setters are more skilled and more efficient than plasterers in applying a backup coat which is plumbed, rodded, and squared to receive tile, because only a tile setter knows exactly how to prepare a wall to the closest possible tolerance to receive tile. It also contends, as do Texas Tile and Martini, that it is more efficient, especially where only one coat of mortar is to be applied (as on the Rainbo project), to use the same craft for both the mortar work and the tile laying. The Plasterers contends, however, and the record supports its contention, that plasterers are trained to work to as close tolerance as do tile setters. It contends further that plasterers can work faster because they do plastering full-time rather than part-time, and that it is more economical to use plasterers.

The Board is satisfied from the entire record that neither craft can claim superior skill with regard to

the application of the mortar bed. Although it appears to be a necessity to use the same craft for both the last mortar coat and the tile laying if the tile is to be set while the last coat is wet, it further appears that where the last coat is allowed to dry before the application of the tile, as was the situation in both cases here, using one craft or two is equally efficient.

Texas Tile's and Martini's assignments, therefore, were not inconsistent with either the relative skills involved, or with efficiency of operation.

D. *Other agreements.*

On August 22, 1917, the Plasterers and the Tile Setters entered into an agreement pertaining to the preparing or plastering of walls and ceilings which are to receive tile in the conventional or three coat method. This agreement provided that ". . . plasterers . . . shall prepare or plaster all walls which are to receive tile. They shall plumb, rod and square all walls and scratch same so as to guarantee adhesion of the final coat which shall be put on by the Tilelayer to act as a bed for his tile." A 1924 award entered in evidence spelled out the division of work in substantially the same terms.

E. *Action of the Joint Board.*

Both the Plasterers and the Tile Setters agree that they are bound by the Joint Board. The Plasterers urges that in Case No. 23-CD-133 the Joint Board awarded the work to them in its decision of November 10, 1966, and its clarification of March 15, 1967. The Tile Setters argues, as seen hereinabove, that the award favored tile setters and not plasterers. Inasmuch as Texas Tile had not agreed to be bound by any decision of the Joint Board, the decision by that

body with respect to the M. D. Anderson project is merely one of the factors which we must consider in assigning the disputed work.[4] In Case No. 23-CD-137, there was no Joint Board award.

In view of all the circumstances, including its ambiguous nature, and upon the entire record, the Board is of the opinion that the Joint Board award abovementioned should not be accorded controlling weight.

F. *Conclusions as to the merits of the dispute.*

As the Board stated in the *J. A. Jones* case,[5] it will, in conformity with the Supreme Court's *CBS*[6] decision, determine in each case presented for resolution under Section 10(k) of the Act, the appropriate assignment of disputed work only after taking into account and balancing all relevant factors.

Having considered all pertinent factors, we conclude that employees represented by the Tile Setters are entitled to perform the work in dispute. Tile setters are at least as skilled in the performance of the work as plasterers, and both Texas Tile and Martini, which assigned them to the work, have been satisfied with both the quality of their work and the cost of employing them. Moreover, the instant assignments of the disputed work to tile setters are consistent with the explicit provisions of the collective-bargaining

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[4] *Local 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carleton Brothers Company)*, 141 NLRB 1138; *United Brotherhood of Carpenters and Joiners of America, Local No. 515 (J. O. Veteto & Son)*, 148 NLRB 351.

[5] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402, 1410-11.

[6] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union Local 1212 (Columbia Broadcasting System)*, 364 U.S. 573.

agreement between the Tile Setters and Texas Tile and Martini, are consistent with the past practice of the Employers, and are not inconsistent with area or industry practice. We conclude that the Employer's assignment of the work to the tile setters should not be disturbed. We shall, accordingly, determine the existing jurisdictional dispute by deciding that tile setters, rather than plasterers, are entitled to the work in dispute. In making this determination, we are assigning the disputed work to the employees of Texas Tile and Martini, who are represented by the Tile Setters, but not to that Union or its members.

G. *Scope of the determination.*

The work which gave rise to the disputes has already been completed. The Tile Setters requests an award which would cover the whole United States or, in the alternative, an order covering the geographic area in which the Employers operate. The record will not support a finding, necessary for the granting of a broad order, that the disputes promise to recur between the parties. Our present determination, therefore, is limited to the particular projects at which this instant dispute arose.

Determination of Disputes

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board hereby makes the following determination of the disputes.

1. Tile layers employed by Texas State Tile and Terrazzo, Inc., and Martini Tile and Terrazzo Company, who are represented by Tile, Terrazzo and Marble Setters Local Union No. 20, are entitled to

perform the work (at the M. D. Anderson Library, University of Houston, and the Rainbo Baking Company, Houston, Texas, respectively) of applying the one coat or float coat of Portland cement mortar as backup material to receive tile.

2. Plasterers Local Union No. 79, Operative Plasterers and Cement Masons International Association of Houston, Texas, is not entitled, by means proscribed by Section 8(b) (4) (D) of the Act, to force or require Texas State Tile and Terrazzo, Inc., and/or Martini Tile and Terrazzo Company, to assign the above work to plasterers.

3. Within 10 days from the date of this Decision and Determination of Disputes, Plasterers Local Union No. 79, Operative Plasterers and Cement Masons International Association of Houston, Texas, shall notify the Regional Director for Region 23, in writing, whether it will or will not refrain from forcing requiring Texas State Tile and Terrazzo, Inc., and/or Martini Tile and Terrazzo Company, by means proscribed by Section 8(b) (4) (D), to assign the work in dispute to plasterers rather than tile setters.

Dated, Washington, D. C.

Aug. 22, 1967

John H. Fanning, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT, U. S.

No. 1231

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-65

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC.,

Petitioners,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ———

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC.,

Petitioners,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Texas State Tile and Terrazzo Co., Inc., Martini Tile and Terrazzo Co., and the Tile Contractors Association of America, Inc., intervenors in the proceedings in the court below, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit denying enforcement of an order of the National Labor Relations Board in favor of the petitioners herein.

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 21-63)[1] is not officially reported as yet. The NLRB's Deci-

[1] References to "App." are to the Appendixes to the petition of the National Labor Relations Board in No. 1184, filed De-

sion and Order (App. C, pp. 68-80) is reported at 172 NLRB No. 77. The underlying Decision and Determination of Dispute (App. D, pp. 81-94) of the NLRB is reported at 167 NLRB 185.

JURISDICTION

The judgment of the court of appeals (App. B, pp. 64-65) was entered on June 30, 1970. On October 1, 1970, the court of appeals denied timely petitions for rehearing *en banc* filed by petitioners and the NLRB (App. B, pp. 66-67). On December 23, 1970, Chief Justice Burger extended until January 13, 1971, the time within which petitioners' could file their petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Section 10(k) of the National Labor Relations Act, after a union has taken coercive action to protest an employer's assignment of work to one group of employees rather than another, the NLRB is divested of power to determine the underlying jurisdictional dispute whenever the competing unions have agreed among themselves to be bound by a voluntary method for the adjustment of the dispute although the employer has not consented to be bound by that adjustment.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

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cember 30, 1970, in this same case. These appendixes contain, pursuant to Rule 23(i), copies of all court and administrative opinions in the judgment sought to be reviewed. Pursuant to permission granted by the Office of the Clerk, these opinions are not attached hereto since they have been separately presented.

Section 8(b). It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person . . . where in either case an object thereof is:

* * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class, rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

* * * *

Section 10(k). Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

STATEMENT OF THE CASE

This case involves picketing by the Plasterers Union ("Plasterers"),[2] respondent here, against two different employers, petitioners here, at two different construction sites in order to obtain for their members work assigned by the employers to their own employees, who were members of the Tile Setters Union ("Tile Setters").[3] In both instances, the employers were currently recognizing the Tile Setters as the collective bargaining representative of their employees and had for several years entered into collective bargaining agreements with that union (App. D, p. 89; A. 30, 57, 61, 438).[4] Neither employer had a collective bargaining agreement with the Plasterers (App. D, p. 89).

A. The Dispute Over Petitioner Texas State's Assignment

In 1965, the University of Houston contracted with Southwestern Construction Company ("Southwestern") to construct an addition to the University's Anderson Library. Southwestern then subcontracted the tile and terrazzo work involved on this job to petitioner Texas State Tile and Terrazzo Company ("Texas State") (App. D, pp. 83-84; A. 47, 29-30, 38). This work consisted of the application of tile to the walls of the restrooms and to the stairwalls of the eight-story library building. The tile was applied directly to a second coat of Portland cement mortar after a thin scratch coat of cement had been applied to the metal lath by the Plasterers (App. D, p. 85; A. 31-32, 38-39, 49-50, 150-151).

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[2] Plasterers' Local Union No. 79, Operative Plasterers' and Cement Masons' International Association, AFL-CIO.

[3] Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America.

[4] "A" refers to the portion of the record printed as an appendix to the briefs in the court below. This appendix was submitted to the Court along with the NLRB petition for a writ of certiorari in No. 1184, filed on December 30, 1970.

Texas State, pursuant to its collective bargaining agreement with the Tile Setters, assigned the application of the second coat and the tile to its employees who were represented by the Tile Setters (App. D, p. 84; A. 42, 47, 61, 429-430, 434, 438).

Representatives of the Plasterers protested to the Tile Setters that the application of the second coat was the Plasterers' work (App. D, p. 84; A. 49, 51-52, 54).[5] When the Tile Setters disagreed with this claim, the Plasterers then submitted the matter to the National Joint Board for the Settlement of Jurisdictional Disputes ("Joint Board"), a body set up by the Building Trades Department of the AFL-CIO to settle jurisdictional disputes (App. D, p. 84; A. 54-55). Both the Plasterers and the Tile Setters were bound, as a result of their affiliation with International Unions who are constituents of the AFL-CIO Building Trades Department, to submit jurisdictional disputes to the Joint Board. Texas State was not a signatory to and was not bound in any way to the Joint Board, and neither were its bargaining representatives, the Tile Contractors Association of America or the local chapter of the Tile Contractors (App. D, p. 84; A. 48). Texas State informed the Joint Board of this fact, and stated that it desired to present the dispute to the NLRB (A. 409).

On November 10, 1966, the Joint Board, relying upon precedent of August 22, 1917, ruled that the work in dispute should be assigned to Plasterers (App. D, p. 84; A. 411-412). The Joint Board specifically limited its award solely to the particular project (A. 411-412).

After the Joint Board award, Plasterers sought to obtain the work in question, but Texas State and its employees refused to accede to their demands (App. C, pp.

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[5] The second coat is termed the "brown coat" by Plasterers, and is called either the "float coat" or "setting bed" by the Tile Setters (App. D, p. 85; A. 51-52).

72-73; App. D, p. 84; A. 55-56, 415). On January 24, 1967, Plasterers picketed at the project to protest Texas State's refusal to assign the work to them, and all crafts working on the job honored the picket line, thereby causing a complete work stoppage (App. C, pp. 72-73; A. 33, 34, 47, 439). On February 10, 1967, the United States District Court for the Southern District of Texas, upon the application of the NLRB Regional Director, enjoined the picketing pursuant to Section 10(l)[6] of the Act. (App. C, p. 72; A. 28-29).

B. The Dispute Over Petitioner Martini's Assignment

In 1967, Rainbo Baking Company of Houston, Texas, decided to remodel the panning room of its bakery. It contracted directly with petitioner Martini Tile and Terrazzo Company ("Martini") to install ceramic tile over a brick wall in the baking area of the bakery (App. D, p. 85; A. 57, 99, 107-110). The task involved required nailing metal lath over the brick, applying a coat of Portland cement mortar directly to the lath, and setting the tile onto the cement mortar (App. D, pp. 85-86; A. 57-59, 99, 109-110). Martini, pursuant to its collective bargaining agreement with the Tile Setters, assigned this work to its own employees who were represented by the Tile Setters (App. D, pp. 85-86; A. 57, 438, 429-430, 434).

Martini began working at the project site on March 15, 1967. On March 17, Plasterers picketed the site in order to force Martini to assign the work involving the application of the cement mortar to Plasterers rather than Tile Setters (App. C, p. 73; App. D, p. 88; A. 57-58, 439). During the picketing, other crafts refused to work, and Rainbo officials requested Martini to remove its employees from the premises (App. D, p. 85; A. 439, 59-60, 98-99). Martini complied with the request and

[6] 29 U.S.C. 160(l).

the picketing stopped (App. D, p. 85; A. 59-60, 98-99). Martini subsequently returned to the project and completed the job (App. D, p. 85; A. 57-58).

Although both the Plasterers and the Tile Setters were subject to the Joint Board procedures, the Plasterers did not submit the dispute to the settlement procedures of that body. Martini was not stipulated to or bound by the Joint Board procedures on its own or through any of the associations to which it belonged (App. D, p. 86; A. 57, 128).

C. The Proceedings Before the NLRB

On January 30, 1967, and February 7, 1967, Southwestern and Martini filed charges against the Plasterers with the NLRB, contending that the Plasterers' picketing had violated Section 8(b)(4)(D) of the Act. After investigation of the charges disclosed reasonable cause to believe a violation had occurred, the NLRB, pursuant to Section 10(k) of the Act, issued a notice of hearing to determine the dispute out of which the alleged violation arose. At the hearing in April 1967, Texas State intervened in the consolidated proceedings and participated in the hearing with the charging parties and competing unions (App. C, pp. 68-70; App. D, p. 82). On August 22, 1967, the NLRB issued its Decision and Determination of Disputes.

1. *The Determination of the Jurisdictional Dispute*— In determining the dispute, the NLRB rejected the Plasterers' contention that it had no jurisdiction to determine the dispute. The Plasterers argued that Section 10(k) divested the NLRB of jurisdiction over jurisdictional disputes where "the parties to such dispute" had agreed upon a method for voluntary settlement, and that "the parties" here had agreed upon a method for voluntary settlement since both unions were bound to submit the dispute to the Joint Board. The NLRB found this con-

tention to be without merit because it had consistently held that "the employer who assigned the disputed work must be a party to an agreement that purports to settle an existing jurisdictional dispute" before the NLRB is divested of jurisdiction under Section 10(k), and that neither of the employers involved here had agreed to be subject to or bound by the Joint Board. Accordingly, the NLRB concluded that "the parties" to the dispute had not agreed upon a method for the adjustment of the dispute, and therefore, that the NLRB had jurisdiction under Section 10(k) (App. D, p. 88 n. 3).

On the merits of the dispute, the NLRB weighed all the relevant factors, including the award of the Joint Board, and concluded that at both projects employees represented by the Tile Setters, rather than those represented by Plasterers, were entitled to perform the work of applying the coat of Portland cement mortar upon which tile was to be installed (App. D, pp. 89-94).[7] Accordingly, the NLRB determined that the Plasterers were not entitled to picket or otherwise coerce the employers to assign the work in dispute to plasterers. The NLRB directed the Plasterers to notify the Regional Director of the NLRB within ten days as to whether it would comply with its determination (App. D, pp. 93-94).

2. *The Unfair Labor Practice Proceeding*—The Plasterers declined to comply with the NLRB Decision and Determination of Disputes, and, pursuant to its Rules and Regulations, the NLRB General Counsel issued a complaint upon the 8(b)(4)(D) charges (App. C, pp.

[7] The factors considered by the NLRB included the applicable collective bargaining agreements, the relative skills of the various employee groups, the efficiency of the operation under the respective employee groups, the agreements between the Plasterers and Tile Setters, the industry practice, the employer and area practice, and the Joint Board award (App. D, pp. 89-93). The NLRB did not attach controlling weight to the Joint Board award in "view of all the circumstances, including its ambiguous nature, and upon the entire record." (App. D, p. 92).

69-70). The parties waived a hearing on the complaint and submitted the case directly to the NLRB upon a stipulation and the record in the 10(k) proceeding (App. C, p. 70; A. 438-443).

Upon the entire record, the NLRB found that the Plasterers had violated Section 8(b)(4)(D) of the Act by picketing the Anderson Library and Rainbo Bakery sites for the objects of forcing Texas State and Martini to assign the disputed work to employees represented by Plasterers rather than employees represented by Tile Setters. The NLRB again rejected the Plasterers' contention that Section 10(k) precluded the NLRB from determining the dispute, reiterating its

> consistent interpretation of Section 10(k) that the employer controlling the work assignment as well as the rival unions involved comprise the "parties to such dispute", and all must approve and enter into a voluntary adjustment procedure in order to preclude a hearing and determination pursuant to that Section [App. C, p. 74]

The NLRB issued its usual order, requiring the Plasterers to cease and desist from the unfair labor practices found and to post the appropriate notices (App. C, pp. 77-80).

D. The Decision of the Court of Appeals

The court of appeals (Judges Leventhal and McGowan, with Judge MacKinnon dissenting) set aside and denied enforcement of the NLRB order (App. A, pp. 21-63). In the court's view "the Board erred in claiming authority under § 10(k) of the Act to determine the merits of a jurisdictional dispute between two unions when the unions had agreed on a method for binding arbitration of their disputes" (App. A, p. 32) According to the court, Section 10(k) requires the NLRB to abstain from determining jurisdictional disputes whenever "the par-

ties to such dispute" have agreed on a method for the adjustment of such dispute, and that the proper construction of that provision should be that it "is not the employer but the rival unions (or other employee groups) who are the parties to the jurisdictional dispute contesting which employees are entitled to seek the work in question" (App. A, p. 33). Since all the unions involved were bound to the adjustment procedure of the Joint Board, the court held that the "parties" to the dispute had agreed on a method for the adjustment of the dispute and that the NLRB could not properly proceed under Section 10(k) (App. A, pp. 23-24, 48-49).

In the dissenting opinion, Judge MacKinnon disagreed with the conclusion that the employer was not one of "the parties to such dispute." Relying upon *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 263-264 (1964), he pointed out that under Section 8(b)(4)(D), and therefore 10(k), there is no "dispute" within the contemplation of the Act until one of the unions has made the employer a party to the dispute by striking him or engaging in other coercive action as a result of the employer's assignment of work (App. A, pp. 58-60). Finding no validity to the court's assertion of support for its position in the legislative history and case law, Judge MacKinnon found the "majority opinion . . . to be an unreasonable interpretation of the Act" (App. A, p. 62).

REASONS FOR GRANTING WRIT

The decision of the court of appeals rejects the consistent interpretation which the NLRB has given Section 10(k) since its enactment more than 23 years ago and which has been accepted by all the courts of appeals which have adverted to it. The decision below, if allowed to stand, will undoubtedly have an unsettling effect on the NLRB's administration of this and related provisions of the Act; and in particular will have a disruptive impact

on a major phase of the economy, the building and construction industry, and the NLRB's efforts to stabilize labor relations and curtail work stoppages in that industry. The issue of the proper construction of Section 10(k) is therefore of manifest importance in the administration of the Act and the maintenance of industrial peace. In view of these interests, the potential disruptive effect of the decision after 23 years of consistent interpretation by all administrative, judicial and industry bodies, and the extraneous litigation which the decision below has already engendered,[8] the issue is appropriate for immediate review.

1. Section 10(k) was added to the Act, along with companion Section 8(b)(4)(D), by the Taft-Hartley Amendments of 1947. Section 8(b)(4)(D) makes it an unfair labor practice for a union to picket or otherwise coerce an employer for an object of forcing the employer to assign work to a particular group of employees rather than to another. Whenever a Section 8(b)(4)(D) charge is filed, however, Section 10(k) *directs* the NLRB first to "hear and determine the dispute out of which such unfair labor practice shall have arisen, unless . . . the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute."

In the first cases brought under these provisions, the NLRB held that Section 10(k) must be read together with Section 8(b)(4)(D) for a proper interpretation of its meaning.[9] In interpreting the abstention provision

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[8] See p. 20, *infra*.

[9] *Lodge 68 of the Int'l Ass'n of Machinists (Moore Drydock Co.)*, 81 NLRB 1108 (1949); *Int'l Longshoremen's Union, Local No. 16 (Juneau Spruce Corp.)*, 82 NLRB 650 (1949). In both of these cases, the NLRB rejected contentions that Section 10(k) was applicable only where the employer was a neutral victim to conflicting union claims. In *Juneau Spruce*, it held (82 NLRB at 656): "[I]n the absence of language specifically limiting the application of Section 10(k) to certain situations *only*, or even persuasive

of Section 10(k) in this light, the NLRB has consistently construed the phrase "the parties to such dispute" as referring to the parties embroiled in the dispute resulting in the filing of the charge under Section 8(b)(4)(D), which parties includes the competing unions as well as the employer whose work assignment was the subject of the economic coercion.

Accordingly, the NLRB has consistently held, as it did in the instant case (App. D, p. 88), that it is divested of jurisdiction under the abstention provision of Section 10(k) only where the employer involved and the competing unions have jointly agreed upon a voluntary method of adjustment.[10] The NLRB's twenty-year construction of Section 10(k) in this regard had, prior to the instant case, never been challenged by any court of appeals, and indeed, had been favorably relied upon by those courts reviewing determinations in jurisdictional dispute cases. See *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 326 F.2d 213, 216 (3rd Cir. 1964); *Local 450, Int'l Union of Operating Engineers* v. *Elliott*, 256 F.2d 630, 635-636 (5th Cir. 1958); *Quinn* v. *National Labor Relations Board*, 61 LRRM 2690 (D.C. Cir. 1966); *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 410 F.2d 5, 9 (3rd Cir. 1969) (citing the NLRB decision in the instant case for the proposition that the NLRB need hold a 10(k) hearing only where all parties are not bound to a method for voluntary adjustment), *cert. granted on other grounds*, 397 U.S. 905; *New Orleans Typographical Union No. 17* v. *National Labor Relations Board*, 368 F.2d 755, 763 (5th Cir. 1966).

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legislative history in support of such restricted application, the Board is obliged to give effect to that Section which its language requires."

[10] See, *e.g.*, *Int'l Union of Operating Engineers, Local 66 (Frank P. Badolato & Son)*, 135 NLRB 1392, 1395-1396 (1962), and cases cited at note 1 of the dissenting opinion in the decision below (App. A, p. 51).

2. The NLRB's consistent interpretation of the abstention provision of Section 10(k)—*i.e.*, that the coerced employer as well as the competing unions are "parties" to the dispute and must jointly agree on a method of settlement before the NLRB is divested of jurisdiction—is plainly dictated by the statutory language. The "parties to such dispute", as the phrase reads in 10(k), refers by its terms to "the dispute out of which" the 8(b)(4)(D) charge was filed. But as this Court noted in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 263-264 (1964), no charge under 8(b)(4)(D) is appropriate until a union strikes or takes other coercive action against the employer to force him to assign particular work to employees in its union. Thus, Section 8(b)(4)(D), and therefore Section 10(k), are not operative until one of the unions has made the employer a party to the dispute by coercing him to change his assignment in accordance with the union's wishes. Accordingly, the employer, by the Act's terms, is necessarily a party to the dispute when the 8(b)(4)(D) charge is filed,[11] and therefore is one of the "parties to such dispute" for the purposes of the abstention provision of Section 10(k).

The court below failed to comprehend the statute's plain requirement in this regard. This failure, and the court's clear error in relying upon other grounds to support its view, as shown below, disclose the plain error of the decision below.

a. The fundamental error by the court below was its assumption that the employer was solely a neutral whose interests would be "fully served by any binding settlement between the disputing employee groups" without his participation (App. A, pp. 37-38). The employer in most jurisdictional disputes, particularly in the con-

[11] The latest NLRB Annual Report shows that an employer was the *charging party* in 445 of 478 charges filed under Section 8(b)(4)(D) in the course of the fiscal year. 33 NLRB Ann. Rep. 201 (1968).

struction industry, is vitally concerned that the work be performed by a particular group of employees because of reasons of economy, efficiency, ability, or the like. Indeed, it is often a matter of economic life-and-death for a contractor to have a particular group of employees perform the work rather than another.[12] This is so because the assignment of work to employees represented by another union may result in different terms and conditions of employment, replacement of the contractor's employees with outsiders, or even the loss of the contract by the employer. For example, in the instant case both employers had collective bargaining agreements with the Tile Setters covering the work in dispute, and neither had a contract with the Plasterers; both contractors assigned the work to their own employees represented by the Tile Setters pursuant to their contracts. An award of the work to Plasterers would require the contractors to hire a new complement of employees represented by Plasterers or else give up their subcontract.

In the construction industry, the employer's vital economic interest in the outcome of the jurisdictional dispute is further shown by the relationships involved. As Professor Dunlop, the first Chairman of the National Joint Board has stated:

> The fact that some unions work exclusively, as a matter of policy or custom, for particular contractors tends to convert competition among contractors also into jurisdictional disputes between unions. If a contractor is to hire such a craft he must also hire a sub-contractor. More accurately, the dispute is between a contractor and a union on one side against another contractor and union on the other side.[13]

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[12] Petitioner Martini testified at the hearing that assignment of the work in dispute here to Plasterers rather than Tile Setters would deprive it of 30 percent of its annual business (A. 129).

[13] J. Dunlop, *Jurisdictional Disputes*, New York Univ., Second Annual Conf. on Labor, 486.

For these reasons it is well recognized in the contruction industry that, as one union attorney has written, "an employer is not necessarily a neutral party unconcerned with which group performs the work . . . ." [14]

Moreover, the inclusion of employer groups into the National Joint Board establishes the belief of the union members thereto that the employer has a vital interest and concern in the determination of jurisdictional disputes.[15] As Professor Dunlop has written in this regard: "The National Joint Board has demonstrated that both contractors and unions have a genuine common interest in jurisdictional issues and both have a vital contribution to make to their orderly settlement." [16]

In view of this recognition of the employer's potentially vital interest in the outcome of these disputes, the court below plainly erred in concluding the employer's interests were fully served without his participation in the settlement.[17]

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[14] O'Donoghue, *Jurisdictional Disputes in the Construction Industry*, 52 Geo. L. J. 314, 320-321 (1964).

[15] See n. 9, pp. 14-15, of NLRB petition in No. 1184, for the National Joint Board agreement.

[16] J. Dunlop, *Jurisdictional Problems in Construction Industry*, 40 LRRM 18, 19 (1957).

[17] The statute itself evidences Congress' recognition that jurisdictional disputes occur outside the framework of a neutral employer caught between warring unions. Congress changed Section 8(b)(4)(D) in Conference to expand the scope of that section to protect work assignments to employees *not represented by a labor organization* as well as assignments to organized employees. Thus, Congress recognized that a jurisdictional dispute could arise when an employer preferred for legitimate reasons to assign work to his own unrepresented employees, and that he was entitled to the protection of 8(b)(4)(D) and 10(k) when he did so. Compare Section 8(b)(4)(D) in H.R. 3020, as passed by the Senate, 80th Cong. 1st Sess., pp. 81-83 (1 Leg. Hist. 239-241) (1947). with that section as enacted. See explanation of Senator Taft, 93 Cong. Rec. 7002 (Daily ed., June 12, 1947), in II Leg. Hist. 1624 (1947).

b. The court below plainly erred in urging that the legislative history provided support for its conclusion. The committee reports and floor debates disclose absolutely no discussion of what Congress meant by the phrase "the parties to such dispute" in Section 10(k).

There was no provision comparable to Section 10(k) in the House bill, which merely outlawed "jurisdictional strikes" against the employer. Section 10(k) first appeared in the Senate bill, but there was no discussion of the intended scope of the term "parties" because the concern of Congress was over a clause authorizing the NLRB to appoint an arbitrator to hear and determine jurisdictional disputes. In Conference, the "arbitrator" provision was dropped and Section 10(k) took its present form, but without any discussion of the reach of the term "parties." [18]

The court's conclusion is not supported by its reliance upon the expressed hope of Senator Morse in the floor debates that 10(k) would encourage unions to set up machinery for the settlement of such controversies within their own ranks (App. A, pp. 39-40). It is clear that Senator Morse spoke of the settlement of disputes by unions anterior to a strike and thus before the Act's provisions became operative: in the speech quoted by the court (App. A, p. 40), Senator Morse specifically referred to union machinery "settling such disputes *short of economic action*" (emphasis added). Thus, Senator Morse spoke of the hope that unions could in most cases eliminate the dispute among themselves *prior* to embroiling the employer into the dispute *via* coercive economic action; his comments do not indicate that once the coercive action is instituted the unions could under 10(k) settle the dispute solely among themselves without the employer's participation. The "incentive" to unions to settle the dis-

[18] See *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union, Local 1212, IBEW (CBS)*, 364 U.S. 573, 581-582 (1961), for a detailed discussion of this history.

putes among themselves in order to avoid the Act's machinery is therefore equally present whether or not the employer is considered a party for purposes of Section 10(k).

Accordingly, the legislative history relied upon by the court below does not support its conclusion. As Judge MacKinnon remarked in his dissent (App. A, p. 57): "The truth of the matter is that the legislative history of section 10(k) does not afford any substantial assistance to its interpretation and the weakness of the majority opinion is demonstrated by its assertion that it does."

c. Nor is the court below correct in finding "persuasive evidence" for its interpretation from the "fact that the employer is not bound by a 10(k) determination" (App. A, p. 33). The employer is bound to the 10(k) award in a very meaningful sense, for if he ignores the award he is subject to the full force of economic pressure by the union who was awarded the work and no 8(b)(4)(D) charge will lie to proscribe that pressure. See *Local 502, Int'l Hod Carriers (Cement-Work, Inc.)*, 140 NLRB 694 (1963); *Hoisting and Portable Engineers Local 701*, NLRB Case No. 36-CD-55.

Moreover, the court's argument in this regard fails to recognize that the scheme of the Act in general, and the 8(b)(4) provisions in particular, is non-compulsive. The Section 8(b)(4) provisions were designed to limit picketing in certain undesirable circumstances; they were not designed to *compel* employers to accede to the picketing union's objects where the picketing was found to be legitimate. For example, where picketing under Section 8(b)(4)(B) is found to be primary rather than secondary, and therefore lawful, the picketed employer is under no statutory compulsion; rather, he merely remains subject to that legitimate picketing as long as the union seeks to use that sanction as the means to attain

its object. The same non-compulsion is applicable to the jurisdictional dispute provisions as well. Accordingly, the failure of the Act to "bind" the employer to the 10(k) award reflects only the non-compulsive scheme of the Act rather than Congress' intent that the employer to a jurisdictional dispute is a disinterested neutral.

d. Finally, the court misplaces reliance upon the National Joint Board as a joint body of employers and unions which the court found makes "realistic provision for meaningful attention to the interest of the employer and to questions of efficiency. * * * * It is a board that takes into account factors of economy and efficiency of operation." (App. A, pp. 48-49, n. 27). To the contrary the Joint Board's decisions, as in the instant case (A. 411-412), subordinate such factors to considerations of precedent and practice, and as a result employers have been unwilling to bind themselves to its jurisdiction.[19] Because of the Joint Board's failure to recognize such management considerations, the Associated General Contractors (representing members who perform about 80 percent of the construction in the construction industry) and four national specialty contractor associations, after lengthy negotiations to secure reforms in the Joint Board Plan proved unsuccessful, withdrew from the Joint Board on September 30, 1969, leaving only a few specialty contractor associations as the employer signatories to the current Joint Board Plan.[20]

Under the court's ruling, the Joint Board will have exclusive control over the determination of jurisdictional disputes involving these very contractors who withdrew from that body because of their dissatisfaction with its

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[19] See Note, 77 Yale L. J. 1191, 1200-1201 n. 52, 1203-1204 (1968); K. Strand, *Jurisdictional Disputes in Construction* 45, 93, (1961).

[20] Construction Labor Report, No. 732, Oct. 1, 1969 (BNA). Petitioner Tile Contractors Association and its members withdrew in 1959.

consideration of their necessities. It is indeed unlikely that in the future the Joint Board will respond more favorably to an employer's considerations should the decision here, that the employer has no part in the determination of the dispute, be allowed to stand.

3. The issue presented is a recurring and important issue in the NLRB's administration of the Act, and one of vital consequence particularly to employers in the construction industry. The decision of the court below, unless it is overturned, will cause immediate disruption of established practices and relationships in the construction industry and will drastically hamper the NLRB's efforts to curtail work stoppages in that industry.

The most recent NLRB Annual Report shows that 478 charges of 8(b)(4)(D) violations were filed in the fiscal year, and 306 of them (64 percent) involved the construction industry.[21] The decision below should prompt even more charges as unions who have Joint Board precedent in their favor stand to use economic pressure without proscription should the Joint Board follow the precedent and rule in their favor.

Further, contrary to the opinion of the court below (App. A, pp. 34-36), the likelihood of the NLRB obtaining a 10(l) injunction is severely hampered by the instant decision. The issue before the district court on a 10(l) injunction is whether there is reasonable cause to believe Section 8(b)(4)(D) has been violated. *Penello* v. *Local Union No. 59, Sheet Metal Wkrs. Int'l Ass'n*, 195 F. Supp, 458 (D. Del. 1961). In a case such as here, where the Joint Board award preceded the picketing (App. D, pp. 84-85), a district court, accepting the reasoning of the court below, would be hard pressed to find reasonable cause of an 8(b)(4)(D) violation since the "parties" method of voluntary adjustment had already awarded the work in question to the picketing union.

[21] 33 NLRB Ann. Rep. 208-209 (1968).

Even in cases where the picketing precedes the Joint Board award, a court adhering to the decision below should indeed be hesitant to find reasonable cause where the picketing union could show Joint Board precedent in its favor. Accordingly, the decision below will undoubtedly hamper the NLRB's efforts to curtail work stoppages and maintain industrial peace in the construction industry, where nearly all unions are subject to the Joint Board.

Finally, the decision assuredly will disrupt existing bargaining relationships and engender more litigation. Thus, the Joint Board award in the instant case awarded the work in question to the Plasterers, despite the fact that the employer had a collective bargaining agreement with the Tile Setters covering the same work and had no agreement with Plasterers (*supra*, pp. 4, 5). Since the Tile Setters ignored the award and performed the work, but are bound with the Plasterers to the Joint Board, the Tile Setters are potentially subject to a suit for damages by the Plasterers under Section 301 for violations of their stipulation to the Joint Board. Five such lawsuits, the first of their kind, have already been filed in the few months since the court's opinion issued below.[22]

The decision of the court below therefore portends seriously to impede the NLRB's effective administration

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[22] *Plumbers' Local 157* v. *Laborers' Local 204 and L & K Contracting Co.*, (complaint filed Oct. 21, 1970), C.A. No. 70-C-109 (D.C.S.D.Ind.); *Plumbers' Local 162* v. *Laborers' Int'l Union and Laborers Local 1410 and B. G. Danis, Inc.*, (complaint filed Dec. 9, 1970), C.A. No. 3980 (D.C.S.D.Ohio); *Plumbers' Local 162* v. *Laborers' Int'l Union and Laborers' Local 1410 and Ohio Excavators, Inc.*, (complaint filed Dec. 9, 1970), C.A. No. 3979 (D.C. S.D.Ohio); *Plumbers' Local 129* v. *Laborers' Local 210 and Edward J. DeBartolo Corp.*, (complaint filed Dec. 14, 1970), C.A. No. 1970-580 (D.C.W.D.N.Y.); *Plumbers' Local 129* v. *Laborers Local 91 and Albert Elia Bldg. Co.*, (complaint filed Dec. 14, 1970), C.A. No. 1970-581 (D.C.W.D.N.Y.). A similar action was filed solely against a contractor to protest his work assignment to laborers in *Operating Eng'rs. Local 150* v. *Wild Masonry Co.*, (complaint filed Nov. 23, 1970), C.A. No. 70-C-2944 (D.C.N.D.Ill.).

of the Act and to disrupt labor relations in the construction industry. A prompt resolution of the issue by this Court is accordingly required.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, the Laborers' International Union of North America, AFL-CIO, hereby moves for leave to file a brief *amicus* in support of the Petition. The Solicitor General, Contractor Intervenors, and the Union Intervenors have granted their consent. Counsel for Plasterers' Local 79 has refused consent.

INTEREST OF THE AMICUS

1. The Laborers' International Union, an organization chartered in 1903 by the American Federation of Labor, is presently an affiliate of the AFL-CIO, and is the largest per capita tax affiliate of its Building and Construction Trades Department. The Laborers' Union, with a membership in excess of 600,000, represents highly skilled, semi-skilled and unskilled employees engaged in all phases of building, heavy and highway, and utility construction. As a result of organizational activities, and through thousands of collective bargaining agreements, national and local in scope, the Laborers' Union represents the largest number of craftsmen employed on construction projects and is, therefore, most likely to be affected by the adverse consequences of the decision below.

2. Under provisions of the constitution of the Building and Construction Trades Department, the Laborers' International Union and all other affiliated International Unions are bound to utilize the procedures of the Plan for the Settlement of Jurisdictional Disputes ("Plan"), which operates through the medium of a Joint Board. The Plan also provides that its procedures and awards are binding only on those employers

who have filed stipulations signifying their intention to be bound. The instant case presents recurring situations in which an employer, who had never assented to be bound by Joint Board procedures, is confronted by a union which engages in picketing to enforce a Joint Board award issued in its favor.

The court below, in construing § 10(k), held that the employer is not a "party" to a work assignment dispute; that only the disputing unions need adjust, or agree upon methods for the adjustment of, the dispute; and that where, as in the instant case, the unions are bound to the Joint Board, the resulting job decision is not only binding on the employer, but that the NLRB is forever ousted of authority to hear and determine the merits of the dispute.

The court's decision flies in the face of the express provision of the Plan as well as the consistent interpretation and representations rendered by parties to the Plan in proceedings before the NLRB and before this Court. By erroneously severing the employer from the dispute-resolving procedures, the court below has totally disrupted the long-settled basis for Joint Board and NLRB operations, and has injected notions which are foreign to the vital interests of both management and labor.[1] Indeed, following the long line of unwaver-

[1] In addition to the NLRB and the employers directly involved in the dispute, the Plasterers' Union, Bricklayers' Union and Tile Setters' Union participated in the court below. In addition, the court granted permission for the filing of briefs *amici* by the Building and Construction Trades Department, AFL-CIO, and by the Ceramic Tile Institute of America. Following the court's decision on June 30, 1970, on the NLRB's Motion for Rehearing with Suggestion for *en banc* Consideration, the court granted permission for the filing of briefs *amici* by the Mason Contractors' Association of America, the Associated General Contractors of America, and the Laborers' International Union of North America.

ing NLRB and court decisions, and consistent with the contemporaneous recognition by the parties to the Plan, the Laborers' International Union has historically maintained within the Building and Construction Trades Department that it is bound by determinations of the Joint Board only where the employer responsible for the work assignment has stipulated or otherwise bound himself to Joint Board procedures. The decision below thus places the historical position of the Laborers' Union in jeopardy.

3. In addition, as an affiliate of the Building and Construction Trades Department, with a General President who is a member of the Joint Board Negotiating Committee, and with an international vice-president who regularly sits as a member of the Joint Board, the Laborers' International Union has special interests and experience which are beyond the expertise of the immediate parties, and whose views would be of assistance to this Court in focusing more directly on the issues involved herein.

4. The vast majority of employers in the construction industry have not agreed to be bound by the procedures of the Joint Board. The vast majority of the employees in the construction industry represented by the Laborers' Union are employed by contractors who are members of the Associated General Contractors of America ("AGC"). In addition to the AGC, there are other major segments of the construction industry, such as the Mainline-Pipeline Industry,[2] the home building

[2] The Mainline-Pipeline Industry has never been subject to Joint Board procedures, notwithstanding the fact that the Laborers' International Union, Plumbers' International Union and Operating Engineers' International Union are parties to collective bargaining agreements covering that industry and are each affiliated with the Building and Construction Trades Department.

industry, the plastering and masonry industries,[3] and the heavy and highway industry, which are not participants in the operations of the Joint Board, but which employ substantial numbers of construction craftsmen represented by the Laborers' Union.[4] The reasons for these employers' decisions not to stipulate to Joint Board procedures varies, but many have expressed opposition to the Plan because, notwithstanding procedural provisions to the contrary, the Joint Board refuses to consider consumer, employer and employee interests, and instead predicates its determinations almost exclusively on the basis of ancient or outmoded agreements and practices which bear no relationship to the modern needs of a highly competitive and dynamic industry.

The Laborers' Union has local and national agreements with employers in all of the aforementioned industries. However, there are no employers with voice or vote on the Joint Board to represent the interests of the General Contractor, the principal employer of members of basic trade unions (which includes the Laborers), and thus, no assurance that the interests of the General Contractor and his laborer-employees will be preserved and protected in proceedings conducted by

[3] The Mason Contractors' Association and the Contracting Plasterers and Lathing International Association withdrew from the Joint Board Plan on August 1, 1963, and November 11, 1963, respectively.

[4] By conservative estimate, the following numbers of employees represented by the Laborers' International Union are employed by the following contractor associations: AGC employs approximately 250,000; Mason Contractors Association of America employs approximately 100,000; Contracting Plasterers and Lathing International Association employs approximately 10,000 to 15,000; and there are approximately 40,000 laborers employed in the Pipeline Industry.

the Joint Board. To the contrary, all the present employer associations which participate on the Joint Board are specialty contractor groups which employ mechanical trades, and these employers do not regularly employ laborers represented by the Laborers' Union. Nevertheless, according to the decision below, the Joint Board is empowered to disregard the interests of the General Contractor—and therefore the basic trades unions which represent his employees—and render binding determinations which will forever foreclose any recourse by that employer or any other person to the dispute-resolving procedures of § 10(k) of the Act.

5. The decision below threatens the stability of collective bargaining relationships in the construction industry. The collective bargaining agreements which the Laborers' Union has with employers providing for resolution of disputes by procedures *other than* those of the Joint Board will be sapped of vitality, and the attempted implementation of Joint Board decisions at the jobsite over nonstipulated contractors and their employees can only lead to undying jurisdictional strife.

Further, the Laborers' International Union stands to suffer irreparable injury since, under the decision below, the Joint Board could now proceed to render a national award, giving to another union that work which employees represented by the Laborers' Union have performed in excess of fifty years to the satisfaction of the owner, the employer and the public—without the participation, voice or vote of a single employer from the industry in which such work is performed—and even if the trade awarded the work had never been employed in that branch of the industry. In addition to the loss of membership which such action would pro-

duce, the stability provided by existing collective bargaining agreements would be substantially undermined, and previous successful efforts in organizing unorganized employees will have been for naught.

CONCLUSION

For the foregoing reasons, the Laborers' International Union believes that it has sufficient interest in this proceeding and, accordingly, respectfully requests the Court to grant this motion for leave to file the accompanying brief *amicus* in support of the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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202/737-8320

December 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA AS AMICUS CURIAE

This brief *amicus* is filed by the Laborers' International Union of North America, AFL-CIO, contingent upon the Court's granting the foregoing Motion for Leave to File a Brief as *Amicus Curiae.*

The opinions below, the basis of this Court's jurisdiction, the question presented, and the statutory provisions involved are set out on pp. 1-3 of the NLRB's Petition.

The interest of the Laborers' International Union appears on pp. i-vi of the above-noted Motion.

REASONS FOR GRANTING THE WRIT

Introduction

The instant case arises in the building and construction industry and involves the question of primary jurisdiction and supremacy where there is a direct conflict between jurisdictional dispute awards rendered by the National Labor Relations Board ("NLRB") and the construction industry's private Plan for Settling Jurisdictional Disputes Nationally and Locally ("Plan") through the procedures of its Joint Board.

The court below ruled that "the parties" to a jurisdictional dispute included only the disputing unions and not the employer whose work assignment generated the conflict, with the consequence that the NLRB "may not properly proceed to determine a jurisdictional dispute pursuant to Section 10(k) when the disputing unions [but not the employer] have agreed to settle their dispute through binding arbitration." (NLRB Pet. App. A, p. 24). By so ruling, the court below swept away over twenty years of consistent NLRB interpretation and administration of §§ 8(b)(4)(D) and 10(k), and reached a result totally at odds with the express provisions of the Joint Board Plan and the understanding which the parties thereto have consistently held.

The consequences of the court's decision far transcend the merits of the instant dispute or the interest of the immediate parties. While the specific ruling places the court's imprimatur on the operations of the Joint Board, the radical principle that the employer responsible for the assignment of work is not a necessary "party" to any agreed upon method of adjustment, produces radiations which directly affect and

undermine the entire corpus of arbitration law.[1] It is thus not only a question of correcting a lower court's error on a matter of statutory interpretation but, of even greater dimension, the need to protect the orderly and salutary role which arbitration has heretofore played in preserving stable collective bargaining relationships.

I. THE ISSUE IS "RIPE" FOR DETERMINATION

Petitioner has alleged that, with regard to the question of whether an employer is a "party" to a jurisdictional dispute processed under §§ 8(b)(4)(D) and 10(k), for over twenty-three years the courts of appeals "have approved" the Board's interpretation,[2] and that the issue is of manifest importance in the administration of the Act." (NLRB Pet., p. 10). That parties affected by § 8(b)(4)(D) Orders have previously acquiesced in the Labor Board's consistent interpretation of § 10(k) gives added significance to the twenty-three years of judicial approval, for in the industrial arena where experienced and sophisticated counsel for both management and labor have vigorously challenged virtually every other provision

[1] *Steelworkers* v. *Warrior & Gulf*, 363 U.S. 574, 582 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

[2] Indeed, in *Local 825, Operating Engineers (Burns & Roe, Inc.)* v. *NLRB*, 410 F.2d 5 (3rd Cir. 1969), *cert. granted on another issue*, this Term, Nos. 40 and 42, the court of appeals, in enforcing the Labor Board's 8(b)(4)(D) Order, approved the NLRB finding that "Burns, White [the employers] and Local 825 were both bound by Joint Board rulings" [162 NLRB 1617, 1632 (1967)], and specifically held that the Board properly declined to hold a 10(k) hearing because the "present parties had agreed in advance upon a method of voluntary adjustment and did in fact utilize that method in this case." (410 F.2d 5, 9).

of the statute, the absence of exception over so vital an issue can hardly be attributed to oversight. The unprecedented decision of the court below enunciates a clear and detailed rejection of uniform Labor Board and judicial precedent, and neither the passage of time nor the process of "elucidating litigation" can sharpen the issue or alter the conflict which the decision below has created.

Indeed, it is already apparent that delay by this Court can only contribute to greater industrial strife and an unwarranted increase in litigation as unions which are successful before the Joint Board pursue diverse routes "to compel an employer to change his assignment, or [the incumbent] union to renounce an assignment that the employer is willing to give." (NLRB Pet. App. A, p. 45). Thus, in the less than three months which have elapsed since the court below denied the Board's Petition for Rehearing, five lawsuits have been filed by the Plumbers' Union against the Laborers' Union and those employers whose work assignments are being disputed.[3] Since no party to the

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[3] *Plumbers' Local 157* v. *Laborers' Local 204 and L & K Contracting Co.*, (complaint filed Oct. 21, 1970), C.A. No. 70-C-109 (D.C.S.D.Ind.); *Plumbers' Local 162* v. *Laborers' Int'l. Union and Laborers' Local 1410 and B. G. Danis, Inc.*, (complaint filed Dec. 9, 1970), C.A. No. 3980 (D.C.S.D.Ohio); *Plumbers' Local 162* v. *Laborers' Int'l. Union and Laborers' Local 1410 and Ohio Excavators, Inc.*, (complaint filed Dec. 9, 1970), C.A. No. 3979 (D.C.S.D. Ohio); *Plumbers' Local 129* v. *Laborers' Local 210 and Edward J. DeBartolo Corp.*, (complaint filed Dec. 14, 1970), C.A. No. 1970-580 (D.C.W.D.N.Y.); *Plumbers' Local 129* v. *Laborers' Local 91 and Albert Elia Bldg. Co.*, (complaint filed Dec. 14, 1970), C.A. No. 1970-581 (D.C.W.D.N.Y.). In addition, a similar action was filed solely against a contractor to protest his work assignment to laborers: *Operating Eng'rs. Local 150* v. *Wild Masonry Co.*, (complaint filed Nov. 23, 1970), C.A. No. 70-C-2944 (D.C.N.D.Ill.).

Joint Board had, in the past, resorted to the courts to enforce Joint Board awards, the decision in the instant case has already spawned the first of what are likely to be countless efforts to displace the NLRB from its central role in determining work assignment controversies. In the interests of preserving industrial peace, and to avoid unwarranted litigation designed to disrupt established collective bargaining relationships, there is an urgent need for this Court to grant review.

II. THE EMPLOYER IS AN INDISPENSABLE "PARTY" IN JOINT BOARD PROCEEDINGS

Prior to the enactment of the Taft-Hartley amendments in 1947, the construction unions affiliated with the Building and Construction Trades Department, AFL, had their own "Referee" system for resolving jurisdictional disputes. This was strictly an inter-union arrangement which made no provision for employer participation in any form. On June 23, 1947, the Taft-Hartley Act was enacted into law. On July 9, 1947, the Building Trades Department suspended the "Referee" system.

Thereafter, during January 21-25, 1948, the Executive Council of the Building Trades Department, with the assistance of John T. Dunlop and NLRB General Counsel Robert Denham, met with negotiating committees composed of employer-members of the Associated General Contractors of America ("AGC") and various specialty contractor associations in an effort to devise a plan which would conform to the requirements of §§ 8(b)(4)(D) and 10(k) of the Act. These negotiations resulted in the establishment of a Plan for National Joint Board for Settlement of Jurisdictional Disputes which, as suggested by the NLRB, would be binding on those employers and unions who committed them-

selves to the Plan's procedures.[4] The new Plan was executed by the Building and Construction Trades Department, the AGC, and seven National Associations of Specialty Contractors, and became effective May 1, 1948. (The negotiations and complete text of the original Plan are described in greater detail in the attached excerpt from the official Proceedings of the 41st Convention, Building Trades Department, 1948, Appendix, *infra*, pp. 2a-7a).

The 1948 Plan, which is substantially the same as the present Plan, established a Joint Board providing, as the name implies, *joint and equal representation, voice, and vote to employers and unions alike.* Hence, since its inception, the Plan has required that the Joint Board consist of an equal number of employers (further divided equally between General Contractors and Specialty Contractors)[5] and unions (also equally divided between basic trade unions and specialty unions)

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[4] On Feb. 11, 1948, in an address to the AGC Convention, NLRB General Counsel Denham stated:

> . . . We of the [NLRB] have suggested to the Associated General Contractors, to the National Associations of Specialty Contractors, and to the officials of the labor organizations that are predominant in the field the desirability of working out among themselves, if possible, some joint procedure to which *both the labor organizations and the members of the various employer associations would be firmly committed.* . . . (emphasis added) [21 LRRM 51 (1948)].

[5] In addition to the withdrawal from the Plan by the Mason Contractors' Association and the Contracting Plasterers' and Lathing International Association during 1963, on September 30, 1969, the Associated General Contractors of America terminated the Plan and withdrew from further participation in its operations, and no General Contractors have been represented on the successor Joint Board since that date. See *Constr. Labor. Rep.*, 732, A-13; 742, A-1 (12/10/69). Mills, *The Construction Industry*, 21 Lab. L.J. 498, 504-5, n.16 (August 1970).

and an "impartial chairman." Moreover, from 1948 to the present time, the express provisions of the Plan as well as the contemporaneous interpretation of the parties thereto have recognized that the Plan would be compatible with the statutory requirements of § 10(k) only so long as the employer responsible for the assignment of the disputed work specifically "stipulated" or otherwise assented to be bound by Joint Board decisions.[6]

Thus, Article V, § 5 of the original Plan (App., *infra,* p. 6a), and Article III, § 7 of the Plan in effect at the time of the instant dispute have preserved the following identical[7] provision:

> It is understood only those contractors who employ members of the organizations affiliated with the Building and Construction Trades Department of the AFL-CIO, shall be considered as bound by this agreement *when they have signed a stipulation* setting forth that they are willing to subscribe to and be bound by the terms and provisions of this agreement. (Emphasis added).[8]

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[6] See statement of Richard J. Gray, President of the Building Trades Department, at the time the Plan was adopted. (Appendix, *infra,* p. 1a). The history and development of the Joint Board is reviewed in Strand, *Jurisdictional Disputes in Construction: The Causes, The Joint Board, and the NLRB,* 89 *et seq.* (1961).

[7] The only language change was to substitute "AFL-CIO" for "A.F. of L." following the 1955 merger.

[8] After the Associated General Contractors terminated the original Plan and withdrew from further negotiations, a renegotiated Plan was executed on April 7, 1970, between the Building and Construction Trades Department and the "Participating [Specialty] Contractors' Employers' Associations." The identical provision appearing in the text which binds the Plan only to those contractors who "have signed a stipulation" was carried forward into the current Plan ("Green Book," Art. III, § 7, p. 10, 1970).

The foregoing provisions of the Plan have also been restated, with additional elaboration, as part of the "Procedural Rules and Regulations of the National Joint Board":

> These procedures shall apply to:
>
> (a) Contractors who employ members of the organizations affiliated with the Building and Construction Trades Department, AFL-CIO, and *who have signed a stipulation* setting forth that they are *willing to be bound* by the terms of the agreement establishing the Joint Board, *or* who are members of a signatory association of contractors with *authority to bind* its members *or* who are parties to a collective bargaining agreement *providing* for the settlement of jurisdictional disputes under the procedures herein set forth. (Emphasis added).[9]

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[9] In 1955 and 1957, the Joint Board retained Professor Archibald Cox (later, Solicitor General) to prepare and file comprehensive briefs with the NLRB in the *A. W. Lee*, 113 NLRB 947, and *Acoustical Contractors*, 119 NLRB 1345, cases, respectively. In these briefs, Professor Cox made it clear that the Joint Board itself adhered to the unequivocal language of the Plan and that its procedures were binding only on those employers who stipulated themselves to the Joint Board. Thus, in suggesting to the NLRB how it should handle "cases in which all parties are not bound by the Joint Board agreement," the Joint Board understood that employers were "parties" to the dispute, and specifically acknowledged that the NLRB "must" proceed to determine the matter under § 10(k). Thus, "[T]o put the matter concretely, suppose that a general contractor not bound by the Joint Board Agreement assigns laborers to erect a twenty-foot self-supporting scaffolding. The carpenters would probably claim the work. *If they strike and a charge is filed, the NLRB must make a determination under Section 10(k).*" (Emphasis added). [*Acoustical Contractors*, (Jt. Bd. Br. p. 57)]. See also, excerpt of Joint Board Brief filed as Appendix to Respondent's Brief (pp. 1a-4a) in *NLRB* v. *Radio and Television Broadcast Engineers Local 1212, ("CBS")*, 364 U.S. 573 (1961), No. 69, Oct. Term, 1960.

The Joint Board, in its twenty-two years of operation, has blatently ignored the foregoing express requirements of the Plan and its Procedural Rules and Regulations by consistently rendering "decisions of jurisdictional disputes between unions whether or not the employers making the assignment of disputed work are bound thereto."[10] It was this consistent practice which produced the recent impasse in Joint Board negotiations and caused the AGC to sever its twenty-year relationship with the Plan. It was this same consistent practice which caused the Laborers' Union, as one of the union members of the Joint Board Negotiating Committee, to vote against continuation of the Plan. And it is because of Joint Board persistence in assuming the power to bind a non-assenting party in violation of its own rules that makes conflict between it and the NLRB inevitable.[11]

As noted previously, the Plan was adopted in 1948 in response to the strictures imposed by the statute, and the NLRB, as well as union and employer members of the industry itself, clearly recognized that the responsible employer was an indispensable party in the resolution of any jurisdictional dispute. Consistent with

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[10] Statement to court below by Building and Construction Trades Department, *Amicus Curiae, Brief*, p. 4.

[11] Since § 10(k) becomes operative only where a union engages in conduct violative of § 8(b)(4)(D), the hoped-for alternative to industrial strife which the Joint Board Plan was to provide has not been realized; and the inevitable conflict arises in those cases where employers are not stipulated, and the union successful before the Joint Board resorts to picketing and other self-help measures to enforce an award which the employer has no obligation to respect. See, *e.g., Bldg. & Constr. Trades Council (Charles J. Dorfman)*, 173 NLRB No. 208, 69 LRRM 1594 (1968); *Plumbers Local 189 (R. W. Wander)*, 176 NLRB No. 129, 71 LRRM 1340, 1341, n.2 (1969).

this contemporaneous understanding and the unequivocal provisions of the Plan, the NLRB in the instant case found that Texas State Tile and Terrazzo Company ("Texas State") had not assented to be bound by the Joint Board (NLRB Pet., App. D, pp. 84, 91), and quite properly proceeded to determine the merits of the dispute as required by § 10(k) of the Act.[12] In reversing the NLRB, the court below, like the Joint Board, totally ignored those express provisions of the Plan which require employer stipulations; and by severing the employer's interests and assigning no role to the employer in the resolution of jurisdictional disputes, the court has, in effect, rewritten the Joint Board Plan and reinstituted the pre-1948 "Referee" system. Moreover, by gratuitously stating that the Plan and its operations was subject to no "infirmity that undercut its fairness and reliability" (NLRB Pet., App. A, p. 48), the court further compounded its error by placing the imprimatur of judicial propriety upon a procedure which is inherently defective and unfair in its administration.

The interpretation rendered by the court below poses serious and unsettling questions for employers and unions in the building and construction industry. From the union's point of view, present authority indicates that an international union and its affiliates are bound by Joint Board determinations as long as they remain

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[12] In the instant case, the Plasterers' Union protested Texas State's assignment of the disputed work to Tile Setters by *picketing* and by submitting the matter to the Joint Board. In contesting the same assignment by Martini Tile and Terrazzo Company, the Plasterers' Union limited its protest to picketing; the merits of the dispute, however, were never submitted to, or considered by, the Joint Board. (NLRB Pet. App. D., pp. 85-86).

affiliated with the Building and Construction Trades Department.[13] If access to the NLRB is now to be foreclosed to non-stipulated employers, local unions presently performing assigned work who feel aggrieved by adverse Joint Board awards may well find no alternative available other than to disaffiliate from their parent International Union; and this course of action will eventually threaten the very existence of the Building and Construction Trades Department itself. From the employer's point of view, the decision below appears to say that the only way a non-stipulated employer may now avoid the effects of an inter-union agreement and ensure that Joint Board awards will not be given "binding" force is to operate on a non-union basis and make work assignments to employees who are represented by no union affiliated with the Building and Construction Trades Department. The decision below thus poses a very real and immediate threat to the continued vitality and growth of the organized segment of the construction industry. With no alternative available other than drastic action, the field of industrial conflict will inevitably be broadened as parties affected by jurisdictional disputes restructure themselves in order to avoid the strictures of a non-voluntary Plan.

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[13] *A.W. Lee*, 113 NLRB 947 (1955). But *cf.*, *Operating Engineers Local 450 (Rust Engineering Co.)*, 169 NLRB No. 149, 67 LRRM 1389, 1391 (1968), where the NLRB noted that with respect to "outside" line work the International Brotherhood of Electrical Workers "has consistently refused participation in the NJB [National Joint Board], and we have in the past recognized this refusal." See also, *Millwrights Local 1862 (Jelco, Inc.)*, 184 NLRB No. 58, 74 LRRM 1485, 1486 (1970).

III. THE DECISION BELOW UNDERMINES VOLUNTARY ARBITRATION PROCEDURES

The NLRB, in administering the provisions of § 10 (k), is vested with discretion to determine whether the parties have submitted "to the Board *satisfactory evidence* that they have adjusted, or agreed upon methods for the *voluntary adjustment* of, the dispute. . . ." (Emphasis added). In exercising this discretion, the NLRB, faithful to congressional intent[14] and this Court's mandate in *CBS*,[15] has applied to Joint Board proceedings the same notions and standards which are generally applicable to other arbitral bodies. "If by the time the dispute reaches the Board, arbitration has already taken place, the Board shows deference to the arbitral award, provided the procedure was a fair one

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[14] See § 203(d) of the Act, 61 Stat. 154, 29 U.S.C. 173(d). See also comments of Senator Murray, "that full opportunity is given the parties to reach a *voluntary* accommodation without governmental intervention *if they so desire.*" (Emphasis added). 93 *Cong. Rec.* 4035, 2 *Leg. Hist. LMRA* (1947), 1046.

[15] In *NLRB* v. *Radio & Television Broadcast Engineers ("CBS")*, 364 U.S. 573 (1961), after ruling that the NLRB was required by § 10(k) to decide work assignment disputes on their merits, this Court stated (at 583):

> It is true that this forces the Board to exercise under § 10(k) powers which are broad and lacking in rigid standards to govern their application. But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes . . . . It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by *arbitrators*, unions, employers, *joint boards* and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. *Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.* (Emphasis added).

and the results not repugnant to the Act." *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 270-271 (1964).

Accordingly, in what has come to be known as the *Spielberg* doctrine, the Board held that it would recognize awards of arbitrators where "[1] the proceedings appear to have been fair and regular, [2] *all parties had agreed to be bound,* and [3] the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." (Emphasis added). *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). The foregoing standard reflects an effort by the NLRB to encourage the voluntary settlement of labor disputes through procedures which incorporate elementary principles of due process. At the same time, where the arbitral process purports to bind a party who has never agreed "to give the arbitrator power to make the award" [16] or where the proceedings are "tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes of the Act," [17] the Board is mandated to ignore the arbitral award and proceed to resolve the underlying dispute.[18] Although the Board's application of the *Spielberg* standards to diverse situations was viewed approvingly by this Court in *Carey* v. *West-*

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[16] *United Steelworkers* v. *Warrior & Gulf*, 363 U.S. 574, 582 (1960).

[17] *International Harvester Company*, 138 NLRB 923, 927 (1962).

[18] Section 10(a) of the Act, 29 U.S.C. 160(a) provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . . ." See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 267-8 (1940).

inghouse,[19] the court below, in overturning more than twenty years of NLRB experience and practice in dealing with jurisdictional disputes, displayed neither awareness nor concern that it was also overturning the entire corpus of NLRB-arbitration precedent.

The NLRB has been a reluctant dragon of sorts in the jurisdictional arena: while it would have preferred Congress to place dispute-resolving mechanisms in the hands of arbitrators or private bodies, Congress deleted the provisions which would have authorized private arbitration "leaving it to the *Board alone* 'to hear and determine' the underlying jurisdictional dispute." (Emphasis added). (*CBS,* 364 U.S. 573, 581). Accordingly, in discharging its responsibilities, the NLRB has earnestly sought to effectuate congressional policy by developing standards and guidelines which will accommodate its undoubted 10(k) authority to private arbitration procedures. And it has endeavored to support Joint Board procedures by inviting the parties thereto to develop the kind of objective procedures which would comport with basic due process standards required of all arbitration bodies.[20]

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[19] *Carey* v. *Westinghouse Electric Corp.,* 375 U.S. 261, 270-271, notes 7 and 8 (1964). See also, *Smith* v. *Evening News Association,* 371 U.S. 195, 198, n. 6 (1962).

[20] See, *e.g., Millwrights' Local 1102 (Don Cartage),* 154 NLRB 513 (1965), where the NLRB recognized that the parties to the Plan had agreed to revisions providing for a new appeals procedure. In the context of the case before it, the NLRB noted that the employer responsible for the work assignment was not a member of this newly revised Joint Board and stated: "We cannot now say, therefore, that the new Joint Board will be able definitely to settle, on the broad basis desired, the jurisdictional dispute between the contending Riggers' and Carpenters' Locals. Nevertheless, we believe the new Joint Board should be given the opportunity to resolve this dispute on a *voluntary* basis." (Emphasis added). (154 NLRB, at 517). The Court of Appeals for the District of Columbia Circuit reversed and remanded this case with instructions

The Joint Board, however, has refused to heed the NLRB's invitation, and has adamantly continued in its practice of disregarding the provisions of its own arbitration Plan. There is, therefore, a pressing need to correct the error implicit in the decision below, and ensure that unfair or irregular arbitration proceedings will not receive hospitable treatment under national labor policy.

IV. THE DECISION BELOW DISRUPTS ESTABLISHED COLLECTIVE BARGAINING RELATIONSHIPS AND CONFLICTS WITH OTHER STATUTORY PROVISIONS

The Laborers' Union is typical of many of the unions in the construction industry in that it, and its affiliates, are signatory to thousands of collective bargaining agreements (national and local in scope) covering hundreds of thousands of employees. Most of these agreements do not contain provisions requiring resort to the procedures of the Joint Board in the event a dispute arises over an employer's work assignment. Under the reasoning of the court below, however, regardless what the parties to the collective bargaining agreement negotiated, Joint Board procedures and awards are now to be engrafted upon the parties' understandings by operation of law.

Further, the court below embraced the Joint Board in the belief that it alone could provide "permanent" resolution of work assignment disputes because the NLRB has no authority "to compel an employer to change his assignment or a union to renounce an assignment that the employer is willing to give." (NLRB

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requiring the Board to determine the merits of the dispute under § 10(k). *Quinn & Riggers & Machinery Erectors, Local 575* v. *NLRB*, 61 LRRM 2690, 2691 (unreported decision, Nos. 19673 and 19686, March 29, 1966). See also, *Jefferson County Carpenters' District Council (S&W Masonry, Inc.)*, 173 NLRB No. 190, 69 LRRM 1577, 1578, n. 6 (1968).

Pet. App. A, p. 45). Aside from the fact that Joint Board awards provide no *real* permanency because they are limited to the "particular job only,"[21] the inherent defect in the foregoing rationale is that decisions of the Joint Board, or any other private tribunal, are totally ineffective in causing a non-stipulated employer to change his assignment. Although a court proceeding under § 301 of the Act (29 U.S.C. 185) might decree that the successful union before the Joint Board is entitled to perform specified work and the losing union is not (which is precisely what NLRB determinations under § 10(k) presently provide), there is no legally enforceable way to require a non-stipulated employer to honor the Joint Board award or any subsequent court decree, or to employ members of the successful Union. Indeed, the litigation which the decision below has already prompted[22] raises serious and virtually insoluble questions. For example, if the decision below actually contemplates that the losing union should "renounce an assignment," what protection does it have when the employer commences his own § 301 or § 303 suit against that union for violating its collective bargaining agreement?[23] And in the

[21] The Procedural Rules and Regulations of the Joint Board provide:

> 8. Each job decision of the Joint Board shall state that the job decision was predicated upon the particular facts and evidence before the Joint Board regarding the dispute and *shall be effective on the particular job only*. (Emphasis added). (§ 8, p. 14, April 17, 1968).

[22] See cases cited *supra*, note 3.

[23] As this Court recognized in *CBS*, there is no requirement for "... 'substantive symmetry' between § 303(a)(4) on the one hand, and §§ 8(b)(4)(D) on the other," and specifically noted that it "has recognized the separate and distinct nature of these two approaches to the problem of handling jurisdictional strikes (citing *Juneau Spruce*)." [364 U.S. 573, 584-5 (1961).]

same circumstances, what protection is afforded to the renouncing union when employees file unfair labor practice charges, and commence individual lawsuits for the union's breach of its duty of fair representation and for removing the beneficial provisions of their collective bargaining agreement? Further, if an employer is to cease recognizing the incumbent collective bargaining representative and replace the existing employees with members of a "stranger" union which received the Joint Board award, how is the NLRB to handle charges alleging that the replacement of employees violates § 8(a)(3), that the recognition of the "stranger" union violates § 8(a)(2), and that in the process there was a trampling on the "employees" established §7 rights?

The decision below has thus set in motion what already appears as an endless chain of unwarranted litigation which, unless checked by this court, may well destroy established collective bargaining relationships and split the construction trades movement wide open.

CONCLUSION

For the above noted reasons, as well as those stated by the National Labor Relations Board, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1970

APPENDIX

[Excerpt From Report of President, Building and Construction Trades Department, To 41st Annual Convention, November 10, 1948]

Plan for Settlement of Jurisdictional Disputes

During the past year the Department devoted a considerable portion of its time to the problem of working out a plan under which judisdictional disputes could be settled promptly and equitably, without loss of time. For years the prevention and settlement of jurisdictional disputes have been our most serious problems, and time after time we have tried various plans, all of which were of value, but no one of which was as successful as we had anticipated it would be. A new formula was obviously needed, and this we hope we have found in the Plan for the Settlement of Jurisdictional Disputes which went into operation on May 1st of this year.

I cannot emphasize too strongly the fact that this Plan does not owe its inception to the Taft-Hartley Act, although it satisfies the requirements of that act, and was dicussed a number of times with Mr. Robert Denham, General Counsel of the NLRB. Long before the passage of the Taft-Hartley Act we were engaged in negotiations with the Associated General Contractors in the attempt to find a workable way out of the difficulty. More than a year and a half ago, months before the Taft-Hartley Act was adopted, a plan for a National Joint Conference Board of the Building Industry, made up of both employers and representatives of labor, was drafted and was about to be submitted to the membership for ratification, when premature publicity made it impossible of completion. The Department went right to work on a substitute plan. In January of this year the plan began to take final shape, and I presented it to the Associated General Contractors on February 12th, at their convention in Houston, Texas. It was ratified on the same day by the AGC, and later was also ratified by seven specialty contractors' associations—Painting and Decorating Contractors of America; National Association of Master Plumbers; Contracting Plasterers International Association; National Electrical Contractors Association; Tile Contractors Association of America; Heating, Piping and Air Conditioning Contractors Association, and the Sheet Metal Contractors National Association. Early in March the Executive Council of the Department, in a special meeting, approved the plan, and on March 11th it was submitted to the Presidents of the national and international unions and ratified by them. In order to take advantage of the Plan contractors do not have to belong to one of the ratifying associations, but must employ members of unions affiliated with the Building and Construction Trades Department, and must sign a stipulation agreeing to be bound by decisions of the National Joint Boards.

The continuing, administrative agency of the Plan is the Board of Trustees, which also is authorized to decide whether disputes submitted to the Impartial Chairman are the subject of decisions or agreements of record. The Board of Trustees consists of M. A. Hutcheson of the Carpenters, Frank A. Fitzgzerald, of the Operating Engineers (taking the place of James W. Close, deceased), William O'Neill of the Plumbers and Pipe Fitters, and myself, representing labor, and J. D. Marshall of the A.G.C., Edward P. Palmer, of Senior & Palmer, general contractors, Paul M.

* * *

[Excerpt From Official Proceedings]

ANNUAL REPORT OF EXECUTIVE COUNCIL

Building and Construction Trades Department American Federation of Labor

Cincinnati, Ohio
November 10, 1948

To the Officers and Delegates in Attendance at the Forty-first Annual Convention of the Building and Construction Trades Department, AFL.

Greetings:

The Executive Council of the Building and Construction Trades Department had before it many cases since the Convention in San Francisco, California, in October, 1947. We wish to report that three regular Executive Council meetings were held this year and one Special meeting on the following dates: January 21-25, 1948, Miami, Florida; Special meeting March 9, 1948, Washington, D. C.; May 5-6, 1948, Milwaukee, Wisconsin, and August 18-20, 1948, Chicago, Illinois.

A report of the action taken at these meetings is presented below, and we submit same to this Convention for consideration and action:

CASE NO. 1. Proposed Plan for Settling Jurisdictional Disputes.

At the January meeting the Executive Council members continued their discussion of the Proposed Plan for Settling Jurisdictional Disputes at some length and it was agreed that representatives of national contractors associations be invited to appear before the Executive Council for the purpose of discussing the proposed plan, after which General Counsel Denham and Mr. John Dunlop of the National Labor Relations Board would appear.

Mr. Robert N. Denham, General Counsel of the National Labor Relations Board and Mr. John Dunlop, representative of the National Labor Relations Board appeared before the Executive Council. Mr. Denham advised the Executive Council at length relative to certification elections and other points of interest in regard to the Labor-Management Act.

The following committee of representatives of National Associations of Contractors appeared before the Executive Council:

Mr. Carl Jansen, President, Dravo Corporation, Pittsburgh, Chairman, A.G.C. Labor Relations Committee.

Mr. Roy Pickett, President, Walbridge Aldinger Company, Detroit, Vice-Chairman, A.G.C. Labor Relations Committee. (Representing Building Contractors).

Mr. Morris DeWitt, Porter DeWitt Company, Poplar Bluff, Missouri, Representative, A.G.C. Labor Relations Committee. (Representing Highway Contractors)

Mr, L. C. Rogers, President, Bates & Rogers Construction Company, Chicago Illinois, Member A.G.C. Labor Committee. (Representing Heavy Construction).

Mr. J. D. Marshall, Assistant Managing Director, A.G.C. Washington, D. C.

Mr. H. R. Cole, Executive Secretary, Tile Contractors Association of America, Inc., Washington, D. C. (Representative of Specialty Contractors).

Mr. William J. Cour, National Electrical Contractors Association, Washington, D. C. (Representative of Specialty Contractors).

Mr. Jansen presented statement relative to the Proposed Plan for Settling Jurisdictional Disputes with suggested changes and after a thorough discussion it was decided that Mr. Jansen and President Gray meet for the purpose of seeing to what extent they could come to an understanding as to the various provisions of the proposed draft and report back to the Executive Council the result of their conference.

The proposed plan as developed by Mr. Jansen and President Gray was again submitted to the Council and a general discussion was held.

The representatives of the contractors associations advised the procedure they would have to follow before definite approval of the Proposed Plan could be given. The representatives of National Associations of Specialty Contractors are to take the matter up immediately with their associations and the Associated General Contractors are to take the matter up at their convention to be held February 10th, in Dallas, Texas.

Mr. Denham and Mr. Dunlop again appeared before the Executive Council with representatives of the contractors associations present and advised relative to elections for certification and the setting up of areas throughout the United States for the the purpose of holding elections.

Mr. Denham requested that consideration be given to the appointment of a Joint Steering Committee from both groups to assist the National Labor Relations Board in their efforts to set up areas throughout the United States and to assist the National Labor Relations Board generally.

The Executive Council then gave consideration to the matter of holding a special meeting of the nineteen Presidents for the purpose of presenting the Proposed Plan, and upon motion of Vice-President Durkin, seconded by Vice-President Byron, it was unanimously decided that the Executive Council hold a special meeting on March 9th and that the General Presidents be advised by President Gray to hold themselves in readiness for a meeting the second week of March, in Washington.

At the Special meeting of March 9, 1948 President Gray advised the Executive Council the purpose of the special meeting, reading Case No. 4 of the Executive Council's Supplementary Report to the San Francisco convention which sets forth the procedure to be followed in preparing the proposed plan for the settlement of jurisdictional disputes. President Gray further advised that the Associated General Contractors and seven National Associations of Sub or Specialty Contractors had approved the proposed plan.

A general discussion was held in regard to several portions of the proposed plan and upon motion of Vice-President Tracy, seconded by Vice-President McSorley, it was decided unanimously to present the proposed plan to the nineteen General Presidents for their adoption or rejection.

(On March 11, 1948, a meeting of General Presidents or their representa-

tives was held in Washington, D. C., and the following plan for Settling Jurisdictional Disputes was adopted to become effective May 1, 1948).

PLAN FOR NATIONAL JOINT BOARD FOR SETTLEMENT OF JURISDICTIONAL DISPUTES

Approved by the Building and Construction Trades Department, A. F. of L., as per instructions of the fortieth annual convention and by the Associated General Contractors and committee representing the Specialty Contractors.

"In consideration of the mutual promises and covenants herein contained, it is agreed by and between the parties hereto as follows:

ARTICLE I

"Effective Date—Sec. 1. This agreement shall take effect on May 1, 1948, and shall remain in force and effect until December 31, 1948, and shall continue in effect for each year thereafter unless terminated as provided for herein. Changes or amendments to this agreement may be made as provided for herein.

"Sec. 2. Any party signatory to this agreement desiring to change or terminate this agreement shall notify the other party in writing at least thirty (30) days prior to the 31st day of December of any year. When notice for change is given, the nature of the changes desired must be specified in the notice. This agreement shall be subject to change at any time by mutual consent of the parties hereto. Any changes agreed upon shall be reduced to writing and signed by the parties hereto, the same as this agreement.

ARTICLE II

"Establishment of Board.—Sec. 1. There shall be established a National Joint Board for the Settlement of Jurisdictional Disputes in the building and construction industry to be composed of an impartial chairman, two (2) members selected by the Building and Construction Trades Department of the A. F. of L., and two (2) members selected by the employers, one of whom shall be a member of the participating general contractors of the industry and one representing the participating national associations of specialty contractors in the construction industry.

"Sec. 2. There shall be set up a labor and industry pool of 24. The 12 industry pool members shall be selected by the various participating employers' associations and shall represent employers of members of the building and construction trades organizations affiliated with the Building and Construction Trades Department; and 12 members of the labor pool shall consist of the Vice-Presidents of the Building and Construction Trades Department of the A. F. of L., and four (4) General Presidents of National and International Unions affiliated with the Building and Construction Trades Department.

"Selection From Pools of Labor and Industry Members to Sit With Chairman.—Sec. 3. When a dispute has been referred to the Joint Board, the Chairman of the Joint Board shall select from the industry and labor pools, subject to the approval of the labor and industry members of the Board of Trustees, two (2) men from each who shall sit with the Chairman and pass judgment and render a decision on any matters pertaining to jurisdictional disputes which are referred to the Joint Board. In making these selections from the industry and labor pools,

two men from each pool as provided for in Section 1, Article II, shall be selected who are in no way connected with or involved in the dispute which is to be acted upon by the Joint Board.

ARTICLE III

"Board of Trustees.—Sec. 1. There shall be established a Board of Trustees. The Board of Trustees shall consist of the Joint Board Chairman, four (4) labor members and four (4) employer members, two of the employer members shall be representatives of general contractors and two of the employer members shall be representatives of specialty contractors, selected by the participating parties to this agreement.

"The industry and labor members of the Board of Trustees shall have the duty of selecting the impartial chairman provided for in Section 1 of Article II of this agreement.

"The Board of Trustees as provided for herein shall in all cases first investigate the claims of the disputing parties to determine whether or not a disposition thereof has been made by a previous decision of record or by recorded agreement between the parties to the present dispute, and issue a ruling as to the decision or the agreement governing in the case. For this purpose, all agreements and decisions recognized under the provisions of the constitution of the Building and Construction Trades Department shall be considered as constituting the record.

"The Board of Trustees shall prepare annually a budget of the necessary expenses for the following twelve (12) months, and shall submit the same to the Building and Construction Trades Department, A. F. of L., and to the National Associations of Employers, signatory to this agreement, for approval. The total amount of the budget when approved shall be subscribed annually in advance, fifty (50) percent by the Building and Construction Trades Department, A. F. of L., and fifty (50) percent by the participating National Associations of Employers, signatory to this agreement. All expenditures shall be within the approved budget, and the Board of Trustees shall have complete supervision over the same and shall render an annual report to the Building and Construction Trades Department, A. F. of L., and to participating employers associations.

"Joint Board Rules and Regulations.—The Chairman and Board of Trustees shall have the authority to establish such procedural regulations and administrative practices as may be required for the effective administration of this agreement provided such regulations and practices are consistent with the expressed terms of this agreement.

"Sec. 2. It is understood that in signing this agreement the parties agree to bear their appropriate share of the Joint Board's expense and to furnish their representatives on the Joint Board, the labor and industry pools provided for in this agreement.

ARTICLE IV

"Duties of the Joint Board.—Sec. 1. It shall be the duty of the Joint Board to consider and decide all cases of jurisdictional disputes in the building and construction industry which are referred to it by any of the International Unions

involved in the dispute, or an employer directly affected by the dispute on the work in which he is engaged; or by a participating organization representing such employer.

ARTICLE V

"Joint Board Procedure.—Sec. 1. When a dispute is filed with the Board, the Chairman thereof shall immediately notify the President of the Building and Construction Trades Department of the existence of such dispute and the President of the Department shall call a conference of the General Presidents involved for the purpose of bringing about an agreement. If a satisfactory agreement is concluded, the President of the Department shall immediately submit to the Chairman of the Board a copy of the agreement reached, properly signed by the contesting parties and attested by the President of the Department. The terms and provisions of this aforesaid agreement shall remain in effect as per the provisions of the Constitution of the Department. In the event the dispute is not settled by agreement between all the parties involved at the end of ten (10) days, the Chairman of the Joint Board shall docket the case for hearing and decision in accordance with the procedure hereinafter outlined.

"Sec. 2. In the event any party to a dispute fails to present their case within the stated time, the Joint Board shall, nevertheless, proceed with the case and make its decision on the basis of the evidence presented.

"Sec. 3. When the Board of Trustees finds a dispute has not been settled by a decision or agreement of record, the Chairman of the Board shall notify all General Presidents of National and International Unions affiliated with the Building and Construction Trades Department and participating employers organizations, stating the controversy which is to be considered and allow all parties interested to present evidence, orally or by brief or both. The Joint Board shall give thirty (30) days notice of the date set for hearing. Briefs shall be submitted and exchanged by all parties to the dispute at least ten (10) days prior to the hearing date.

"Making Decisions.—Sec. 4. The Joint Board shall in every instance consider all pertinent evidence, and shall render a decision, if possible, within ten (10) days after the conclusion of the hearings. Copies of the Joint Board's decisions shall be sent to all parties signatory to this agreement.

"Sec. 5. Any decision or interpretation by the Joint Board shall immediately be accepted and complied with by all parties signatory to this agreement.

"It is understood only those contractors who employ members of the organizations affiliated with the Building and Construction Trades Department of the A. F. of L., shall be considered as bound by this agreement when they have signed a stipulation setting forth that they are willing to subscribe to and be bound by the terms and provisions of this agreement.

ARTICLE VI

"Local Settlements.—Sec. 1. In any community or area where a plan for the settlement of jurisdictional disputes which has been recognized by the Building and Construction Trades Department now exists, it shall be used in the first in-

stance to bring about an agreement or settlement. However, any such local settlement or agreement shall only apply to the particular job in question, and an appeal therefrom may be taken directly to the Joint Board by any of the parties as provided for in Section 1 of Article IV.

ARTICLE VII

"Continuance of Work.—Sec. 1. Pending a decision by the Board or such settlement as may be arrived at through the offices of the Building and Construction Trades Department, A. F. of L., there shall be no stoppage of work arising out of any jurisdictional dispute.

"Members of organizations affiliated with the Building and Construction Trades Department shall continue to work on the basis of their original assignments, provided no employer will assign employes to perform work contrary to decisions or agreements of record.

ARTICLE VIII

"Sec. 1. It is the sense of the parties hereto that the members and Chairman of the Joint Board shall tender to the National Labor Relations Board, their services as expert witnesses in any hearing held by the Board under the provisions of Section 10 (k) of the National Labor Relations Act, as amended, and that no fees shall be charged for such service beyond the statutory witness fees and mileage allowance.

"Signed for the Building and Construction Trades Department, A. F. of L.:

Richard J. Gray,
President.
Herbert Rivers,
Secretary-Treasurer.

"Signed for the Participating Employers Associations:

Paul M. Geary,
H. R. Cole.

"Signed for the Associated General Contractors of America, Inc.:

H. E. Foreman,
Managing Director.
J. D. Marshall,
Assistant Managing Director."

At the May meeting President Gray reported relative to the minutes of the Board of Trustees and the procedures set up by the Board.

At the August meeting an extensive discussion was held relative to the workings of the National Joint Board for Settlement of Jurisdictional Disputes. President Gray advised the Executive Council relative to the activities of the Board thus far, and it was regularly moved and seconded that President Gray contact the contractors representatives signatory to the agreement and request conference at the earliest possible date to discuss possible changes in the agreement.

MOTION FOR LEAVE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1231

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC.,

Petitioners,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

No. 1184

NATIONAL LABOR RELATIONS BOARD,

Petitioner;

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Rule 42(1) of the Rules of this Court, the following contractor associations—Associated General Contractors of America, International Association of Wall & Ceiling Contractors, Mason Contractors Association of America, National Roofing Contractors Association, and National Utility Contractors Association—hereby move for leave to file a brief amicus curiae in support of separate petitions for a writ of certiorari filed by the National Labor Relations Board in No. 1184

and by Texas State Tile and Terrazzo Co., *et al.*, in No. 1231. Plasterers Local 79 [1] declined to grant consent to the filing of a brief amicus curiae on behalf of the above-designated contractors; all other parties to this proceeding consented in writing.

The petitions in No. 1184 and No. 1231 seek review of a decision by the District of Columbia Circuit, setting aside a finding by the NLRB that the Plasterers had violated Section 8(b)(4)(D) of the Act. In reversing the NLRB, the court specifically rejected a NLRB policy of twenty-years' standing and held that the NLRB has no authority under Section 10(k) of the Act to determine a jurisdictional dispute where the unions involved in the dispute have agreed upon a voluntary method of adjusting the dispute.

INTERESTS OF THE AMICI

1. The amici here are all national associations representing contractors in various phases of the construction industry. The Associated General Contractors of America ("AGC" herein) represents approximately 9,000 general construction contractors who perform contracts in the amount of approximately $75,000,000,000 per year. The other amici represent approximately 3,000 contractors providing specialized construction, usually as subcontractors, at all kinds of construction projects: the International Association of Wall & Ceiling Contractors represents more than 450 contractors involved in the application of wall and ceiling systems; the Mason Contractors Association represents more than 1500 masonry contractors, who annually perform contracts for masonry construction in excess of $750,000,000; the National Roofing Contractors Association represents 600 contractors who perform the bulk of all roofing construction in the country; and the National Utility Contractors Asso-

[1] Plasterers Local Union No. 79, Operative Plasterers' and Cement Masons' International Association, AFL-CIO, petitioners below and respondent in the proceedings herein.

ciation represents more than 300 contractors engaged in the construction of utility lines and other utility construction projects.

2. These amici have a substantial interest in the issue raised by the petitioners. The issue involved, the proper interpretation of the jurisdictional dispute provisions of the Act, is of vital importance to all industry, but particularly to the construction industry because that is where most jurisdictional disputes occur.[2] Each of the amici and their constituent members have been involved, and currently are involved, in innumerable jurisdictional disputes with various building trades craft unions. The resolution of these disputes are of vital concern to the contractors involved, because the contractor's economic existence is to a substantial degree affected by the outcome of work-assignment disputes and their speedy resolution.

3. Ever since the jurisdictional dispute provisions were enacted, these disputes have been handled in a consistent manner before the NLRB, with the employer participating along with the unions to present their respective positions. The NLRB's administration of these provisions has resulted in minimizing extensive work stoppages, and has resulted in awards in jurisdictional disputes based upon relevant criteria as required by this Court's decision in *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union, Local 1212 (CBS)*, 364 U.S. 573 (1961). The decision below rejected the NLRB's consistent interpretation of the Act, and disrupts the settled procedure for determining jurisdictional disputes. The holding of the court below would operate to displace the NLRB as the primary body determining jurisdictional disputes and to eliminate the participation of the affected employer in resolving juris-

[2] The latest annual report of the NLRB shows that 64 percent of the 478 jurisdictional dispute charges filed in the preceding year involved disputes in the construction industry. 33 NLRB Ann. Rep. 208-209 (1968).

dictional disputes over the employer's assignment of work. In the construction industry, the effect of this decision would be to place the determination of nearly all jurisdictional disputes in the National Joint Board, since building trades craft unions are, pursuant to their affiliation with the Building and Construction Trades Department (AFL-CIO), bound to submit their disputes to that body.

4. The court's decision presents grave problems to the construction industry. The National Joint Board, in making its awards, has consistently subordinated factors essential to the operation of a contractor's business (economy, efficiency, ability, etc.) to reliance upon ancient and outmoded agreements or decisions of record (many dating back to early 1900's), and as a result many employer associations have now withdrawn from that Board. None of the amici here are stipulated to the current National Joint Board. Accordingly, the court's decision places the resolution of work-assignment disputes, a matter of vital concern to a construction contractor's economic existence, in the hands of a body which scarcely considers essential managerial considerations and before which the contractor is not entitled to participate.

5. The court's decision is contrary to the plain intent of Congress, as reflected in the statutory language. Moreover, the court's interpretation reflects its misconception of the underlying nature of jurisdictional disputes as understood by Congress, and also as understood by the creators of the National Joint Board, employer and union representatives alike. These misconceptions led to the essential premise to the court's decision—*i.e.*, that the employer to a jurisdictional dispute is a neutral who "cares not how the dispute is decided but wants merely that it be decided."[3] This premise is patently incorrect, and even the history of the National Joint Board plainly shows that body always has considered

[3] See App. A, pp. 37-38, NLRB Petition in No. 1184.

the employer to have a vital interest in the outcome of the settlement, and its procedures have emphasized the importance of the employer's full participation in the settlement process.

6. The amici urge that the issue raised in the respective petitions is of vital significance to the construction industry, and that they, as national associations for general contractors, subcontractors and specialty contractors, appropriately represent the interests of that industry. Further, the amici suggest that because of the AGC's primary role in the creation of and long-time participation in the National Joint Board, they are uniquely qualified to present in their brief the approach of the National Joint Board to jurisdictional disputes and the current failures therein.

CONCLUSION

For the foregoing reasons, the amici respectfully request the Court to grant this motion for leave to file the accompanying brief amicus in support of the above-referenced petitions for writ of certiorari to the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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January 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1231

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC.,

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PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

No. 1184

NATIONAL LABOR RELATIONS BOARD,

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PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INTERNATIONAL ASSOCIATION OF WALL & CEILING CONTRACTORS, MASON CONTRACTORS ASSOCIATION OF AMERICA, NATIONAL ROOFING CONTRACTORS ASSOCIATION, AND NATIONAL UTILITY CONTRACTORS ASSOCIATION.

INTERESTS OF THE AMICI

This brief is submitted pursuant to Rule 42 of this Court, subject to the Court's granting of the Motion for Leave to File a Brief as amicus curiae, filed herewith, in support of petitions for a writ of certiorari filed in No. 1231 by Texas State Tile and Terrazzo Co., *et al.*, and in No. 1184 by the National Labor Relations Board. These petitions seek review of the same decision by the United States Court of Appeals for the District of Columbia Circuit; each presents the same issue.

References to the opinions below, the jurisdictional statement, the question presented, and the relevant statutory provisions are set forth in pp. 1-3 of each of these petitions.

The interest of the amici is stated in the attached Motion (*supra*, pp. 2-5), and is not repeated herein.

REASONS FOR GRANTING THE WRIT

The petitions filed in this case question the validity of the court of appeals' interpretation of an important provision of the Act. The holding of the court of appeals—that the NLRB has no authority to determine a jurisdictional dispute under Section 10(k) when the competing unions have agreed upon a voluntary method for the resolution of the dispute—is contrary to the consistent interpretation the NLRB has given since Section 10(k) was enacted in 1947, and which has been accepted without qualification by the courts of appeals and the industry itself.

The decision of the court, if allowed to stand, undoubtedly would have an unsettling effect on all industry because it clouds with uncertainty the role of the NLRB and the employer in the resolution of jurisdictional disputes. In particular, in the construction industry, where

most jurisdictional disputes occur,[1] the decision threatens to disrupt stable and beneficial relationships, and seriously to impair the employer's reasonable control over essential economies in the operation of his business.

The issue presented is therefore of manifest importance in the administration of the Act and the maintenance of industrial peace.

I. The Court Below Committed Plain Error In Holding the Employer Was Not a Party to a Jurisdictional Dispute.

The decision of the court below turns on the court's definition of the "parties" to a jurisdictional dispute within the meaning of Section 10(k) of the Act. The NLRB is directed under that section to determine a jurisdictional dispute underlying an unfair labor practice charge under Section 8(b)(4)(D) unless "the parties" to that dispute have agreed on a method of settlement. The NLRB has consistently held that the struck employer as well as the competing unions are parties to the jurisdictional dispute; however, the court below rejected the NLRB's interpretation, holding that it "is not the employer but the rival unions (or other employee groups) who are the parties to the jurisdictional dispute contesting which employees are entitled to seek the work in question" (NLRB Pet., App. A, p. 33). Accordingly, the court held that the NLRB "may not properly proceed to determine a jurisdictional dispute pursuant to § 10(k) when the disputing unions have agreed to settle their dispute . . . ." (NLRB Pet., App. A, p. 24). The court's interpretation of the word "parties" is plain error, finds no support in the statute or legislative history, and is contrary to the interpretation given by the National Joint Board from the time of its creation.

a. The statute does not specifically define just who are parties to a jurisdictional dispute, but the language

[1] See n. 2, *supra* p.

of the relevant provisions plainly shows that the employer as well as the competing unions are deemed to be "parties" to the dispute. Section 8(b)(4)(D) makes it an unfair labor practice for a union to picket or coerce an employer for an object of forcing the employer to assign work to one group of employees rather than to another group. When a charge is filed under Section 8(b)(4)(D), the NLRB is required under Section 10(k) to "determine the dispute out of which such unfair labor practice shall have arisen, unless . . . the *parties to such dispute* submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute." [Emphasis supplied.]

Thus, the "parties" to the jurisdictional dispute, by the clear terms of the statute, are the parties to "the dispute out of which" the 8(b)(4)(D) charge was filed; and that dispute must include the employer, because no charge under 8(b)(4)(D) can be filed until the union has picketed the employer or taken some other prohibited action to force the employer to assign the work to its members. See *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 263-264 (1964). Therefore, the unions must already have made the employer a party to the dispute before Sections 8(b)(4)(D) and 10(k) can become operative; he is accordingly a "party" to the dispute for the purposes of Section 10(k).

b. The NLRB has so determined the scope of the term "parties" in Section 10(k) from the time the first cases under that provision arose. Accordingly, under 10(k), the NLRB proceeds to determine all jurisdictional disputes unless all the parties—the competing unions and the employer—have agreed upon methods for the voluntary adjustment of the dispute.[2] The NLRB's construction, except for the decision here, has never been chal-

[2] See cases cited in NLRB Pet., p. 12 n. 7.

lenged by any court of appeals, and indeed, has been favorably relied upon by several courts.[3]

The National Joint Board, from its inception, has also agreed with this interpretation of the meaning of "parties" and the abstention provision of Section 10(k). Indeed, the National Joint Board came into being in 1948 because union and industry groups believed that a joint dispute-settling body was necessary to comply with the abstention provision of Section 10(k).

Prior to the enactment of the Taft-Hartley amendments in 1947, the construction unions affiliated with the Building and Construction Trades Department utilized an inter-union "Referee" system for resolving jurisdictional disputes. This system provided for no form of employer participation. After Taft-Hartley, the Referee system was dropped, and the construction unions entered into negotiations with employer groups in an effort to devise a plan which would conform to the requirements of Sections 10(k) and 8(b)(4)(D). On May 1, 1948, these negotiations resulted in the establishment of the National Joint Board, with the Associated General Contractors ("AGC"), seven national associations of specialty contractors, and the Building and Construction Trades Department as signatories. This plan by its terms bound only those employers and unions who were stipulated to its procedures.[4] The Joint Board rec-

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[3] *National Labor Relations Board* v. *Local 825, Int'l Union of Op. Eng.*, 326 F.2d 213, 216 (3rd Cir. 1964); *Local 450, Int'l Union of Op. Eng.* v. *Elliott*, 256 F.2d 630, 635-636 (5th Cir. 1958); *National Labor Relations Board* v. *Local 825, Int'l Union of Op. Eng.*, 410 F.2d 5, 9 (3rd Cir. 1969); *New Orleans Typographical Union No. 17* v. *National Labor Relations Board*, 368 F.2d 755, 763 (5th Cir. 1966); *Quinn* v. *National Labor Relations Board*, 61 LRRM 2690 (D.C. Cir. 1966).

[4] For this background, see Strand, *Jurisdictional Disputes in Construction: The Causes, the Joint Board, and the NLRB* 89-99 (1961). See, Plan for National Joint Board for Settlement of Jurisdictional Disputes, Art. III, Sec. 7.

ognized that the employer assigning the disputed work was an indispensable party in the resolution of the jurisdictional dispute, and that in the absence of an employer stipulation to the Joint Board, the employer was free under Section 10(k) to take the case to the NLRB even though both unions were stipulated to the Joint Board.[5]

c. The primary basis for the court's interpretation of "the parties" to the dispute was the court's assumption that the employer in a jurisdictional dispute was a "neutral * * * caught in the crossfire between the disputing unions and unable to satisfy either", that he "cares not how the dispute is decided but wants merely that it be decided," and that the "purpose of protecting the neutral employer is fully served by any binding settlement between the disputing employee groups." (NLRB Pet., App. A, pp. 37-38). The assumption that an employer is necessarily a neutral party in a jurisdictional dispute is, however, contrary to fact and economic realities.

The employer in most jurisdictional disputes, particularly in the construction industry, is vitally concerned that the work be performed by a particular group of employees. In that industry, a job is usually obtained through competitive bidding, oftentimes highly competitive bidding. The contractor's bid is carefully based on factors relevant to the employees to whom he assigned the work—*i.e.*, their wage rates, their efficiency, their ability to perform work at the desired quality level, the size of the crew required by the group, etc. The award of this work to another group of employees could result in considerably higher costs because of a change in any

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[5] Strand, *op. cit.*, n.4, *supra*, at 93. Further, in briefs submitted to NLRB, the National Joint Board acknowledged that employers are "parties" to jurisdictional disputes and that the NLRB must decide cases under Section 10(k) where the struck employer is not stipulated to the Joint Board. See, *e.g.*, Brief of the Joint Board (p. 57) in *Acoustical Contractors*, 119 NLRB 1345 (1957).

or all of these factors. Moreover, the award of the work to another group of employees could even lead to the contractor's losing the contract. For example, if, as is so often the case, the contractor has a collective bargaining agreement with a union covering particular work and he assigns the work to that union pursuant to the agreement, an award of the work to a stranger union would require the employer either to hire a new complement of employees represented by the stranger union or else give up the contract. Accordingly, for these obvious reasons, and others, a contractor's economic existence is to a substantial degree affected by the resolution of work-assignment disputes, and he is vitally interested in the outcome.

Moreover, the National Joint Board has recognized from its inception that the employer has a vital interest in the outcome of jurisdictional disputes, and its procedures have emphasized the importance of the employer's participation in the settlement process. Professor Dunlop, the first chairman of the Joint Board, has written in this regard: "The National Joint Board has demonstrated that both contractors and unions have a genuine common interest in jurisdictional issues and both have a vital contribution to make to their orderly settlement." [6]

In view of the employer's vital interest in the outcome of these disputes, and the recognition of this by writers and the Joint Board itself, the court below plainly erred in concluding that the employer's interests were fully served without his participation in the settlement.

d. Nor is the court below correct in asserting that the legislative history supports its view. The committee reports and floor debates disclose absolutely no discussion

[6] J. Dunlop, *Jurisdictional Problems in Construction Industry*, 40 LRRM 18, 19 (1957). See O'Donoghue, *Jurisdictional Disputes in the Construction Industry*, 52 Geo. L. J. 314, 320-321 (1964): "an employer is not necessarily a neutral party unconcerned with which group performs the work."

of what was meant by the phrase "the parties to such dispute" in Section 10(k). And the court's reference to a statement by Senator Morse to the effect that 10(k) would encourage unions to set up machinery for the settlement of controversies within their own ranks is inapposite, for in the speech quoted by the court Senator Morse specifically referred to union machinery "settling such disputes short of economic action." (NLRB Pet., App. A, pp. 39-40). Thus, Senator Morse was plainly expressing the hope that the Act's proscriptions would encourage unions to resolve their differences prior to taking any economic action; his comments do not at all indicate that once the coercive action is instituted the unions could under 10(k) settle the dispute among themselves without the employer's participation. Thus, the legislative history does not support the court's conclusion. As Judge MacKinnon stated in dissenting to the majority opinion below (NLRB Pet., App. A, p. 57):

> The truth of the matter is that the legislative history of section 10(k) does not afford any substantial assistance to its interpretation and the weakness of the majority opinion is demonstrated by its assertion that it does.

II. The Decision Below Does Not Enhance Permanent Resolution of Disputes.

Section 10(k) of the Act, as this Court noted in *CBS*, *supra*, 364 U.S. at 576, "emphasizes the belief of Congress that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions." The court below erroneously concluded that its interpretation of Section 10(k) would enhance the permanent resolution of disputes.

According to the court, although the Act does not make a private settlement between two unions binding on the employer, the winning union in such a settlement could

enforce the award by suing under Section 301 to "secure injunctive relief against a union that has failed to abide by its agreement to honor the Joint Board decision and renounce the work." (NLRB Pet., App. A., p. 45). However, the employer is not bound by the Section 301 decision because he has no agreement to be bound to the Joint Board decision, and he may therefore ignore the decision and assign the work to a third group of employees. Thus, the court's view fails to enhance the permanent resolution of disputes through voluntary means. Rather, by excluding the employer from necessary participation in any dispute-settling procedures, the court's view tends to work to the contrary because such procedures would inevitably result in lesser consideration to management needs and therefore less opportunity for the employer to embrace the result. Further, the court's view is likely to lead to further litigation where the employer has an agreement concerning the work in dispute with the losing union; if that union renounces the work, the employer could sue under Section 301 for breach of contract.

On the other hand, the NLRB's requirement that both unions and the employer must assent to a voluntary method of adjustment does enhance permanent resolution of a dispute. An arbitration agreed upon by the employer and the rival unions would be binding upon all and fully enforceable through normal contract means or Section 301. Thus, this rule effectuates the congressional purpose of enhancing the permanent resolution of jurisdictional disputes.

III. The Disruptive Impact of the Decision Below Compels Immediate Review.

a. The decision of the court of appeals, if permitted to stand, threatens to create industrial strife and impair legitimate managerial considerations throughout industry, but particularly in the construction industry. The effect of the court's decision in that industry would be to place

the determination of nearly all jurisdictional disputes in the National Joint Board, since nearly all construction unions are stipulated to that body.

This would be a matter of grave concern to the construction industry, for in making its awards the Joint Board has consistently subordinated factors essential to the operation of a contractor's business (*e.g.*, economy, efficiency, ability) to reliance upon ancient and outmoded agreements and decisions of record, some, as in this case, dating back to the early 1900's. As a result many employer associations have now withdrawn from the Joint Board.[7] None of the associations participating in this brief are stipulated to the current Joint Board. Accordingly, the court's decision places the resolution of work-assignment disputes, a matter of vital concern to a construction contractor's economic existence, in the hands of a body which scarcely considers essential managerial considerations.[8] And since the Joint Board paid little heed to

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[7] The AGC and seven specialty contractor associations were the first employer groups stipulated to the Joint Board procedures. This Joint Board Plan terminated in 1969 when the AGC and four specialty contractor associations were unable, after lengthy negotiations, to secure certain reforms in the existing plan. The AGC later refused to become signatories to a new Joint Board Plan which went into effect on April 3, 1970. Other specialty contractor associations including Mason Contractors Association, and National Roofing Contractors Association, amici here, withdrew years earlier, as did the Tile Contractors Association, petitioner in No. 1231.

[8] Similarly, the court's decision threatens to disrupt the role of the employer as well as the NLRB in other industries as well. Enterprising unions, on either an industry-wide basis or a case-by-case basis, could mutually agree to a method of adjustment of the dispute, and thereafter resolve the dispute on whatever factors best satisfied their own self-interest. Such a procedure, affecting as it does a matter of such vital concern to the employer's operation of his business, raises questions of fundamental fairness of due process proportions, particularly since the employer would be under the compulsion of unlimited picketing by the union which received the award. (For the inapplicability of an injunction under Section 10(l), see pp. 19-20 of the petition of Texas State Tile, *et al.*, in No. 1231).

managerial considerations when it was of the view that the statute required the employer's participation, it can easily be assumed that the Joint Board will not respond more favorably to these considerations in light of the ruling of the court that the employer has no part in the determination of the dispute.

The effect of jurisdictional dispute resolutions which fail fairly to reflect essential management considerations will surely be to promote litigation and industrial strife. Employers will be forced to ignore the awards, and therefore face the economic consequences of picketing and other coercive acts designed to force acceptance of the awards. Moreover, some employers may seek non-union labor. Further, unions successful before the Joint Board will undoubtedly litigate to compel an employer to change his assignment or sue under Section 301 to compel the unsuccessful union to renounce an assignment that the employer has given. Indeed, five such suits have already been filed since the decision of the court below.[9]

Also, the decision assuredly will disrupt existing and stable bargaining relationships which have been encouraged under other provisions of the Act. Thus, the Joint Board does not recognize jurisdictional claims in collective bargaining agreements between the contractor and a union. In the case here, the Joint Board awarded the work to Plasterers despite the fact that the employer had a collective bargaining agreement with Tile Setters covering the same work and had no agreement with Plasterers (NLRB Pet., App. D, p. 89). If the employer accepted the award and assigned the work to Plasterers, he would breach his contract with the Tile Setters and potentially be subject to suit under Section 301 of the Act. On the other hand, if the employer refused to accede to the award, but the Tile Setters renounced its claim to the

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[9] See cases cited at page 20, n. 22 of the petition in No. 1231 by Texas State Tile and Terrazzo Co., *et al.*

work pursuant to its stipulation to the Joint Board, the Tile Setters would potentially be subject to a similar suit.

b. The issue raised by the petitions is an important and recurring issue in the administration of the Act. The decision of the court is plainly founded on erroneous bases. Its impact, however, is to create substantial uncertainty, to threaten existing and stable relationships and practices, and to engender much litigation. In the interests of preserving industrial peace and avoiding unwarranted disruption with the operations in an essential phase of the economy, there is an urgent need for this Court to grant review of the instant case.

CONCLUSION

For the foregoing reasons, and those stated in the petitions filed in No. 1231 and No. 1184, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 1971

MOTION FOR LEAVE TO FILE A MEMORANDUM AS AMICUS CURIAE

Pursuant to Rule 42(1) of the Rules of this Court, the Building and Construction Trades Department, AFL-CIO, (hereinafter, "Department") moves for leave to file a memorandum as *amicus curiae*. The filing of this motion is occasioned by certain statements, which we deem inaccurate, in the motions and briefs, *amici curiae,* previously filed in this Court by the Laborers' International Union of North America, AFL-CIO (hereinafter, "Laborers") and by the Associated General Contractors of America (hereinafter, "AGC") together with four other employer associations. They involve the position of the building trades unions as to the legal issue decided by the court below, the nature of the prior and current "Plan for Settling Jurisdictional Disputes Nationally and Locally" (hereinafter, "Plan") to which the Department has been the union signatory, and the stabilizing effect on labor relations in the building and construction industry which will result from the decision by the court below. For this reason, consideration of this motion is requested only in the event that this Court grants one or both of the aforementioned motions of *amici.*

INTEREST OF THE AMICUS

The Department, which was established in 1908, is composed of the seventeen international union affiliates of the AFL-CIO which represent employees in the building and construction industry, including the Plasterers and the Bricklayers International Unions, whose affiliated local unions were parties to this case in the court below, and the Laborers. The Department's affiliates represent more than three million employees in the industry. Among the Department's "objects and principles," as stated in Article II of its Constitution, are the following:

(6) To secure the adjustment of trade and jurisdic-

> tional disputes in the building and construction trades industry along practical lines as they may arise from time to time; and such decisions to be final and binding on all affiliated National and International Unions and their affiliated Local Unions.
>
> • • •
>
> (8) To promote industrial peace and develop a more harmonious feeling between employers and employees.
>
> • • •
>
> (10) . . . to protect and advance the interests of the building and construction trades industry.
>
> • • •
>
> (11) To engage in . . . legal . . . activities appropriate for the advancement of the interests of affiliated unions and their members in the building and construction trades industry.

In November 1968 a resolution was adopted by the Executive Council of the Department and was unanimously approved by the Convention of the Department in September 1969 authorizing the filing of a brief *amicus curiae* in this case. *Report of Proceedings of the Fifty-Fifth Convention of the Building and Construction Trades Department, AFL-CIO (1969)*, pp. 92, 296-300. Accordingly, the Department moved in the court below for leave to file a brief, *amicus curiae*. The motion was granted and the Department's brief is referred to in the opinion of the court (Appendix to NLRB Petition, (hereinafter, "A"), p. 31 n. 10). While the motion by Laborers in this Court (p. ii n. 1) refers to that brief, it does not indicate the position asserted therein: the Department's brief supported the interpretation of Section 10(k) adopted by the court below and did so in the belief that such an interpretation would strengthen the structure of the Plan and thus help to stabilize labor relations in the building and construction industry.

The instant motion and memorandum are being filed pursuant to the same authorization and with the same interest which governed the Department's participation in the court below.

CONCLUSION

For the foregoing reasons, the Department would respectfully move for permission to file a memorandum, as *amicus curiae,* in the event similar permission is granted for the filing of other, previously submitted briefs *amici curiae.*

Respectfully submitted,

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February 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PLASTERERS' LOCAL UNION No. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, et al.

No. 1231

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC., *Petitioners*

v.

PLASTERERS' LOCAL UNION No. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, et al.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM AS AMICUS CURIAE ON BEHALF OF BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

An accurate picture of the current Plan, which, effective April 3, 1970, continued the National Joint Board for the Settlement of Jurisdictional Disputes in the building and construction industry, has not been presented by the *amici* papers of Laborers or of AGC and other associations (hereinafter "associations"). In contrast to their one-sided characterization of the twenty-three year old National Joint Board is the statement of then-Secretary of Labor Shultz:

> Significantly, the agreement broadens Board representation by various segments of the industry, provides procedures for handling the most serious and recurring disputes and specifically considers consumer inter-

ests along with the interests of workers and employers.[1]

Contrary to the statement in Laborers' motion (pp. iv-v), general contractors continue as parties to the current Plan and the Joint Board itself continues to include representa-

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[1] The full "Statement by Secretary Shultz," which was released by the U. S. Department of Labor (USDL 11-150) on April 7, 1970, following the Secretary's witnessing of the signing of the current Plan, was as follows:

> In establishing the Construction Industry Collective Bargaining Commission last year, President Nixon expressed this Administration's deep commitment to the institution of free collective bargaining.
>
> For this institution "to survive and prosper" he said, "the parties must assume the full share of their responsibility to the industry and to the Nation".
>
> Today, I am gratified to participate in an occasion that symbolizes this assumption of private responsibility by labor and management in the Nation's vital building and construction industry.
>
> The Building and Construction Trades Department, AFL-CIO, and the participating contractors employers' associations have signed an important agreement that provides more effective procedures for settling jurisdictional disputes locally and nationally.
>
> By not only continuing but revitalizing the 22-year-old National Joint Board, the parties have strengthened the construction industry's machinery for dealing with these troublesome and costly disputes.
>
> Significantly, the agreement broadens Board representation by various segments of the industry, provides procedures for handling the most serious and recurring disputes and specifically considers consumer interests along with the interests of workers and employers.
>
> The National Joint Board—established just after World War II—functions as the building and construction industry's response to the type of private, voluntary solutions to jurisdictional disputes sought by the Congress when it enacted the Taft-Hartley Act.
>
> In January, the Construction Industry Collective Bargaining Commission, with members representing labor, management and the public, endorsed the development of private, dispute-settling procedures by the parties themselves. This agreement dealing with jurisdictional disputes—the product of hard and long negotiations—embodies just that kind of healthy, private action.

tives of the general contracting branch of the industry. There are thirteen organizations which comprise the "Participating Contractors Employers' Associations," the "employer" signatory to the Plan, representing more than 25,000 contractors in the building and construction industry. (These thirteen organizations are listed in an appendix hereto. The seventeen affiliates of the Department are also listed.) Of the thirteen organizations, eight are national associations of mechanical and specialty contractors, and five are employers of the basic trades—carpenters, iron workers, laborers, masons, operating engineers—including the National Constructors Association (NCA) consisting of thirty-three of the largest general contractors in the world (e.g. Bechtel Corp.; Day & Zimmerman, Inc.; Dravo Corp., Engineering Construction Division; Ebasco Services, Inc.; Kaiser Engineers; Koppers Co., Inc., Engineering & Construction Div.; Stone & Webster Engineering Corp.).[2] Indeed, many of the members of the NCA are also members of the Associated General Contractors.[3] The fact that a particular trade association of general contractors—AGC—has chosen to withdraw from participation on the National Joint Board does not mean that the interests of the general contracting branch of the industry cannot be otherwise represented on that Board. The eight employer members (regular and alternate) on the expanded Joint

[2] NCA members hire a large number of Laborers, members of the laborers' Union.

[3] Despite the formal withdrawal of AGC, many others of its members, in addition to NCA members, remain individually stipulated to the Plan. Furthermore, general contractors such as AGC members subcontract a large portion of their contracts to subcontractors who are members of the eight national mechanical and specialty associations which are parties to the current Plan. These facts show that a very large portion of the annual construction volume referred to at page 2 of associations' motion is performed by employers who are stipulated to the current Plan. And, it should be noted that that reference is limited to volume of construction rather than volume of employment. The bulk of organized employees in the industry are employed by the contractors represented by the Participating Contractors Employers' Associations.

Board include four representatives of the general contracting branch of the industry, including two officers of NCA, an official of Ford, Bacon & Davis, which is a member of both NCA and AGC, and an official of Wayne Steel Erectors.[4]

The *amici* papers of Laborers and associations wrongly assert that the decision by the court below will discourage stability in labor relations in the building and construction industry. Similar arguments—including the misplaced factor of AGC withdrawal from the Plan—were made to the court below, *en banc*, in support of the NLRB petition for rehearing, but the petition was denied. In fact, the opposite conclusion is correct: The large measure of stability which already has been brought to the industry by the Plan will be increased under the rule of law enunciated by the court below.

At the outset is the erroneous statement in associations' motion (p. 3) characterizing the NLRB as "the primary body determining jurisdictional disputes." The Department's brief in the court below pointed out that in roughly the same recent 7½ year period the number of job decisions by the Joint Board in the building industry was more than tenfold the number of NLRB 10(k) determinations *in all industries*, and showed further that, unlike NLRB adminis-

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[4] The factual information in the paragraph above has been supplied by the Chairman of the Joint Board and the Secretary of the Participating Contractors Employers' Associations.

With further regard to Laborers' claim that "there is no assurance that the interests of the General Contractor and his laborer-employees will be preserved," it should be noted that one of the "labor" members of the current Joint Board is Maurice Fancher, Fourth Vice President of the Laborers' Union. Pursuant to the Plan (Art. II, Sec. 1), four of the eight "labor" members of the Joint Board are from the basic trades hired by the general contracting branch of the industry. The Laborers' Union is the only affiliate of the Department which has taken the position asserted by it in this case.

tration of Section 10(k),[5] the industry's need for prompt resolution of disputes is being met by the National Joint Board which renders its decisions within a one to two week period following initial referral. The vast preponderance of disputes which are resolved under the Plan and never become the subject of charges before the NLRB is indicative of the significant accomplishments of the Plan not only in the eyes of labor but of management. Contributing to this success is the Plan's prohibition (Art. VI, Sec. 1) against work stoppages pending a decision by the Joint Board.

Even more indicative of the stability being promoted by the Plan are the thousands of dispute-free work assignments which are being made every day on building and construction jobs, following pre-job conferences among affected groups, by reference to the jurisdictional precedents under the Plan. As John T. Dunlop wrote in a letter to participants in the Plan, upon his resignation as chairman of the Joint Board in 1957, "The course of a dispute and almost all job decisions, except those on novel issues, are largely predictable by lines of precedents." 40 LRRM 18, 21. Stipulated and non-stipulated employers, AGC members and non-AGC members, alike, are being guided by and are applying these precedents on a practical basis and are current and quiet beneficiaries of the industrial peace which they afford. K. Strand, *Jurisdictional Disputes in Construction* (1961) (hereinafter, "*Strand*"), which characterized the accomplishments of the Joint Board as "astounding" (p. 99), referred to the fact (p. 101) that "gradually, the decisions and policies of the Joint Board caused the industry to begin to rely more on precedent and compromise and less upon economic power."

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[5] The Department's brief pointed out that in fiscal year 1968 NLRB 10(k) determinations required a total of 172.5 median days from the filing of the charge to the 10(k) determination. For the first six months of fiscal 1969, such NLRB determinations required a total of 185.0 median days.

The "precedents" of the Plan are not limited to, but are more broadly applicable than, decisions confined to particular construction projects. They include national jurisdictional agreements between international unions, whose negotiation, in consultation with the appropriate management groups, is encouraged by the Plan (Plan, pp. 3-4, 7); decisions by the Joint Board in repetitive disputes, after oral hearing, which are applicable on a locality basis (Procedural Rules and Regulations of the National Joint Board, p. 18); and provision for decisions in highly repetitive and widespread disputes by special and jointly-constituted Hearings Panels, following elaborate proceedings, which are applicable nationally (Plan, pp. 8-11) (e.g. the decision of August 24, 1966, by a Hearings Panel including John T. Dunlop, resolving the recurring dispute between Carpenters and Lathers over the installation of ceiling systems, in which AGC participated and which was unsuccessfully challenged in *Lathers v. Dunlop,* Civil Action No. 1221-66 (D. D.C. 1967), *aff'd. per curiam,* 382 F. 2d 176 (D.C. Cir. 1967), *cert. den.* 389 U.S. 971). *Strand* (p. 101) also had occasion to rely on the Dunlop letter illustrating the precedential values of the Plan:

> Dunlop also cited as accomplishments the recognition that: (1) the Joint Board plan allows jurisdiction to be determined in advance of bidding with uniform application among contractors; (2) the plan seeks to regulate competition among unions in the industry by introducing jurisdictional stability; and (3) national jurisdictional agreements among unions are ". . . the very best way to resolve these questions."

The most unstabilizing factor over the past few years in this area of jurisdictional disputes has resulted from utilization of the device of the non-stipulated contractor who, in those cases where it suits him, has taken advantage of the NLRB's interpretation of Section 10(k) to obtain a determination on a particular job contrary to that which has been rendered, or which precedent indicates would be rendered, under the Plan. At times, the contractor may

decide not to stipulate to be bound by the National Joint Board at the instance of a union which wishes to avoid its obligation under Article X of the Constitution of the Department to accept the decisions of the National Joint Board in the building and construction industry as binding. The decision below tends to reduce the unstabilizing effects of this forum shopping practice.

The decision by the court below, by reducing the opportunity to selectively disregard the settlement machinery of the Plan should promote the objective of stabilized labor relations in the building and construction industry.

The briefs of Laborers (pp. 2, 4-7) and associations (p. 11) erroneously imply that the establishment of the Plan, with its joint, labor-management, constituency was a direct response to the enactment of Section 10(k) of the Taft-Hartley Act and reflected an agreement, not challenged until the litigation in this case, with the NLRB's interpretation of that provision. Long before the enactment of Taft-Hartley—during World War I—there was established by the Department the National Board for Jurisdictional Awards which included employers and architects. Other joint forms of machinery succeeded this Board, and even under the Referee System, established in 1936, the Department-selected referees included the then Executive Manager of the Building Trades Employers Association of Cleveland, and the President of the Thompson-Starrett Company. And, with regard to the establishment of the Plan itself, negotiations between the Department and employer groups commenced approximately one and one-half years before enactment of Taft-Hartley. *Strand,* pp. 64-69, 89.

And, while the Department or the Joint Board—which rarely participate in litigation—may previously have chosen not to litigate that aspect of NLRB administration presented to the court below, the 1965 ABA Report of the Special Committee on the Building and Construction Industry—composed of leading attorneys for both labor and management in this industry—stated, "By the term 'parties'

those legislators who discussed the matter indicated that Congress means the disputing unions themselves" (A. 41-42 n. 21). See also *Penello v. Local Union No. 59, Sheet Metal Workers,* 195 F. Supp. 458 (D. Del., 1961), where the issue was raised and the court reached the same conclusion as the court below (A. 42-43).

Contrary to the statements in Laborers' motion (p. ii) and brief (pp. 2, 7-10, 15), the Joint Board's practice of rendering decisions of jurisdictional disputes whether or not the employers making the assignment of disputed work are "bound" to the Plan has been faithful to the provisions of the Plan from its inception in 1948. Thus, the original Plan, to which AGC was one of the signatories, provided (see appendix to Laborers' brief, pp. 5a-6a):

> It shall be the duty of the Joint Board to consider and decide all cases of jurisdictional disputes in the building and construction industry, which are referred to it by any of the International Unions involved in the dispute; *or* an employer directly affected by the dispute on the work in which he is engaged; *or* by a participating organization representing such employer. (Emphasis added.)[6]

The references in the briefs of Laborers (pp. 7-8) and associations (p. 11) to the Plan's provisions regarding the binding to the Plan of stipulated contractors have no bearing on the Joint Board's jurisdiction or on the legal issue decided by the court below. Rather, they simply make it clear that as a matter of contract-arbitration law, a non-

[6] The "Procedural Rules and Regulations" under the Plan have similarly been consistent with Joint Board practice, providing (p. 10), "When the Joint Board has received a protest of work assignment from an International Union *or* a request for a job decision from a contractor, it shall proceed to make a job decision as outlined below;" (emphasis added). The quotation in Laborers' brief (p. 8) of the provision in the regulations specifying those to whom the regulations apply omits the subsequent paragraph of that provision: "(b) All unions affiliated with the Building and Construction Trades Department, AFL-CIO, in the building and construction industry." That provision therefore makes the procedures in the regulations applicable to the unions on an independent basis.

stipulated employer cannot be judicially compelled to abide by Joint Board decisions or the procedural requirements imposed by the Plan. As a matter of history, these provisions were included to allow for representation on the Joint Board of certain associations, such as AGC, which had no power to stipulate their members to the Plan.

It is respectively submitted that consideration of the instant case by this Court, before the legal issues have been litigated in other cases by other courts of appeals, is not required by the unfounded and unsupported claim of the associations that the decision below will unstabilize labor relations in the building and construction industry or the dire warning of the Laborers' Union of local union disaffiliations which "course of action will eventually threaten the very existence of the Building and Construction Trades Department itself" (Laborers' brief, p. 11).

CONCLUSION

For the foregoing reasons, the Department submits that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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February 1971

APPENDIX

MEMBERS OF THE SIGNATORIES TO THE CURRENT PLAN FOR SETTLING JURISDICTION DISPUTES NATIONALLY AND LOCALLY IN THE BUILDING AND CONSTRUCTION INDUSTRY

I. Participating Contractors Employers' Associations

1. National Constructors Association
2. National Electrical Contractors Association
3. Mechanical Contractors Association of America, Inc.
4. National Association of Reinforcing Steel Contractors
5. National Association of Miscellaneous, Ornamental and Architectural Products Contractors
6. National Erector Association
7. Crane and Rigging Division of Heavy Specialized Carriers Conference
8. Plumbing-Heating-Cooling Contractors Association
9. Painting and Decorating Contractors of America
10. Sheet Metal and Air Conditioning Contractors National Association
11. Insulation Distributor-Contractors National Association
12. Gypsum Drywall Contractors International
13. Glazing Contractors Labor Jurisdiction Committee

II. Building and Construction Trades Department, AFL-CIO

1. International Association of Heat and Frost Insulators and Asbestos Workers

2. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
3. Bricklayers, Masons and Plasterers' International Union of America
4. United Brotherhood of Carpenters and Joiners of America
5. International Brotherhood of Electrical Workers
6. International Union of Elevator Constructors
7. International Union of Operating Engineers
8. Granite Cutters' International Association of America
9. International Association of Bridge, Structural and Ornamental Iron Workers
10. Laborers' International Union of North America
11. Wood, Wire and Metal Lathers' International Union
12. International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile Helpers and Finishers, Marble Setters Helpers, Marble Mosaic and Terrazzo Workers Helpers
13. International Brotherhood of Painters and Allied Trades
14. Operative Plasterers and Cement Masons International Association
15. United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association
16. Sheet Metal Workers International Association
17. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1394~~ 70-63

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PLASTERERS' LOCAL UNION No. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

No. ~~1931~~ 70-65

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CONTRACTORS ASSOCIATION OF AMERICA, INC., *Petitioners*

v.

PLASTERERS' LOCAL UNION No. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT PLASTERERS' LOCAL UNION NO. 79 IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

No. 1231

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CONTRACTORS ASSOCIATION OF AMERICA, INC., *Petitioners*

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT PLASTERERS' LOCAL UNION NO. 79 IN OPPOSITION

This consolidated Opposition to the Petitions of the Solicitor General acting on behalf of the National Labor Relations Board (hereinafter "NLRB" or

"Board") in No. 1184 and Texas Tile and Terrazzo Co., Inc., *et al.* in No. 1231 is filed by Respondent, Plasterers' Local Union No. 79.

OPINIONS BELOW

The opinion of the court of appeals (App. A,[1] 21-63) is not yet officially reported. The decision and order of the Board in the unfair labor practice proceeding (App. C, 68-80) are reported at 172 NLRB No. 77. The Board's earlier decision and determination of dispute (App. D, 81-94) are reported at 167 NLRB 185.

JURISDICTION

The judgment of the court of appeals (App. B, 64-65) was entered on June 30, 1970. The Board's timely petition for rehearing *en banc* was denied on October 1, 1970 (App. B, 66-67). The jurisdiction of this Court is invoked by the Board under 28 U.S.C. 1254(1).

QUESTION PRESENTED

If the Court grants the Petition, Respondent accepts the "Question Presented" as posited by the Solicitor General in No. 1184.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*) are set forth in the Petition in No. 1184 at pp. 2 and 3.

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[1] "App. —" refers to appendices A, B, C and D to the Petition of the Solicitor General. "A" refers to the appendix to the briefs in the court below.

STATEMENT

A. The Underlying Dispute and the Attempts of the Plasterers To Settle It

With the following changes and additions, the Respondent accepts the "Statement" of the Solicitor General.

After the Plasterers[2] were unsuccessful in convincing the Tile Setters[3] on the Anderson Library job that the brown coat of mortar should be installed by Plasterers, they submitted the dispute to the National Joint Board for Settlement of Jurisdictional Disputes, Building and Construction Industry (hereinafter, the "Joint Board"), a voluntary private tribunal consisting of union and employer representatives and established for the sole purpose of settling jurisdictional disputes in the construction industry (App. D, 84; A. 54-55).

On November 9, 1966, the Joint Board awarded the disputed work to the Plasterers, except it provided that if tile is to be set the same work day the coat of mortar is installed, the mortar coat is to be installed by Tile Setters (App. A, 25; A. 411, 412). Both the Plasterers and Tile Setters are bound by decisions of the Joint Board by virtue of their membership in the Building and Construction Trades Department of the AFL-CIO (App. A, 31; A. 405, 406).

---

[2] Local Union No. 79, Operative Plasterers' and Cement Masons' International Association.

[3] Tile, Terrazzo and Marble Setters Local Union No. 20 of the Bricklayers, Masons, and Plasterers International Union. For convenience, "Plasterers" and "Tile Setters" will refer to the respective unions and the employees they represent.

For two and one-half months after receipt of that decision, the Plasterers attempted to get the Tile Setters and Texas State to comply with the Joint Board award and assign the work to them, but these requests, though peaceful, were rejected (App. C, 72; A. 33, 34, 47, 413-417). Finally, as a last resort, on January 24, 1967, the Plasterers picketed the Texas State jobsite with a sign stating:

> "Plasterers Local 79 protest the refusal of Texas State Tile and Terrazzo to comply with the National Joint Board. Local Union 79 does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or concerted refusal to work." (App. C, 72). (Emphasis added)

The Tile Setters claimed they did not fully understand the Joint Board award. Therefore, in March, 1967, the Plasterers requested the Joint Board to clarify its earlier award (App. A, 26; A. 415, 418-423). The Joint Board, on March 15, 1967, clarified its award with a detailed exposition of the work belonging to each trade under any circumstance (App. A, 26; A. 424-426). Both the Plasterers and Tile Setters submitted evidence to and argued orally before the Joint Board but the employer, although invited to participate, refused (A. 307, 308, 409, 412, 418).

The decision of the Joint Board did not award the Plasterers all the work that was claimed. The Joint Board recognized "the problems created by having two different trades working at the same time on separately identifiable work operations" and awarded some of the work to Tile Setters "in the interest of efficient operation" (App. A, 26; A. 424, 425). The

Plasterers honored its commitment to the Joint Board and accepted its decision (A. 420, 421). The Tile Setters refused to comply with the Joint Board's clarification.

B. National Labor Relations Board Proceedings

In its Section 10(k) decision, the Board devoted exactly one footnote to the "Question Presented" here which is characterized by the Solicitor General as "an important and recurring one in the administration of the Act" (App. D, 88; Br. 19).

The Board, in a decision which did not discuss the legal or policy reasons for rejecting the two-union "parties" argument of the Plasterers, affirmed the employers' assignments.[4]

C. The Decision of the Court of Appeals

The court of appeals (Judges Leventhal and McGowan, with Judge MacKinnon dissenting) refused to enforce the Board's order. The court found that the Board lacked authority under 10(k) "to determine the merits of a jurisdictional dispute between two unions when the unions had agreed on a method for binding arbitration of their disputes,"—here, the Joint Board (App. A, 32). The court held that under 10(k) an employer is not a party to the jurisdictional dispute and therefore he is not indispensible to the voluntary adjustment mechanism.[5]

---

[4] The Board's decision on the Section 8(b)(4)(D) phase of the case was basically a repetition of its earlier 10(k) decision (App. C, 74-76).

[5] In view of its ruling, the court did not have to reach the actual merits of the jurisdictional dispute between the unions (App. A, 23, n. 3).

ARGUMENT

I. There Is No Conflict Among the Circuits and the Issue Presented Is Not Ripe for Review

A clear reason for denying the Petitions at this time is that the issue is simply not yet appropriate for review by this Court.

The Board and its supporters imply, with varying degrees of intensity, that the decision of the court below conflicts with the decisions of other circuits. This is incorrect. As the court of appeals stated, "in any meaningful sense," this question is "one of first impression in the federal courts" (App. A, 33). In fact, while the Board *now* claims several circuit court opinions "have heretofore accepted the Board's view" (Br. 12), the Board "candidly admit[ted to the court below] that these cases have no more than 'adverted to' the issue before [the court] and contend[ed] merely that they 'reflect' its view" (App. A. 34, 35, n.11).

A review of the Board's cited cases supports the court's view that this case was one of first impression. In *NLRB* v. *Local 825, Int'l. Union of Operating Engineers,* 410 F. 2d 5 (3rd Cir. 1969), rev'd on other grounds ... U.S. ..., 27 L. Ed. 2d 398 (1971), the unions *and* the employer were stipulated to the Joint Board. In *New Orleans Typographical Union No. 17* v. *NLRB,* 368 F. 2d 755 (5th Cir. 1966), there was no agreement between the unions for a voluntary adjustment of their dispute. The court in *NLRB* v. *Local 825, Int'l. Union of Operating Engineers,* 326 F. 2d 213 (3rd Cir. 1964), found that only one of the *unions* involved in the dispute had agreed to the voluntary adjustment of the dispute. Finally, *Local 450, Int'l. Union of Operating Engineers* v. *Elliott,* 256 F. 2d 630 (5th Cir. 1958) was an appeal from a 10(1) injunction

where the court did not have to reach this issue. The issue raised here was not litigated or discussed by the courts in these cases.[6]

Actually, the only other Court which has discussed the issue presented here and approached the issue in light of the fresh imprint of this Court's opinion in *National Labor Relations Board* v. *Radio and Television Broadcast Engineers' Union hereinafter* "CBS", 364 US 573 (1961), is in agreement with the analysis of the court below:

> "[T]he Supreme Court [in *CBS*] view[s] the policies of § 10(k) as directed towards inducing voluntary settlement between the groups of employees involved, but also the language of that section would seem to compel it." *Penello* v. *Local Union No. 59, Sheet Metal Workers Int'l. Ass'n.*, 195 F. Supp. 458, 466 (D. Del. 1961) (App. A, 42, 43).

Commentators, including the American Bar Association's joint labor-management "Committee on the Building and Construction Industry", also agree with the reasoning of the court of appeals on this issue. The Committee's Report stated:

> "By the term 'parties' those legislators who discussed the matter indicated that Congress means the disputing unions themselves. Nowhere in the legislative history is there any indication that Congress sought to require employer participation in this agreed upon method of adjustment of the dispute. . . ." Report, *ABA Section of Labor Relations Law*, pp. 452, 457 (1965).[7]

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[6] *Quinn* v. *National Labor Relations Board*, 61 LRRM 2690 (D.C. Cir. 1966) (concurring op. of Chief Judge Bazelon) was also cited by the Board. The lower court fully explained its inapplicability to the question here (App. A, 47, n. 25).

[7] The same view was expressed in Sussman, *Section 10(k): Mandate For Change?* 1967 B.U.L. Rev. 201, 229.

In sum, then, there is no conflict of authority between the circuits on this issue. As we show *infra*, Judge Leventhal's opinion is imminently correct on the merits and there is a substantial probability that other circuits passing on the issue will agree with the court below. If this substantial probability is borne out, there will be no need for this Court to review the issue. Furthermore, the work giving rise to the instant dispute has long been completed (App. D, 93) and thus no current harm will be done to the parties to these Petitions if this Court defers review of the issue until it is ascertainable whether there will be any conflict among the circuits.

II. The Decision of the Court of Appeals Is Correct

An equally sound reason for denying the Petitions is that the court of appeals' decision is the only result consistent with the plain meaning of the Act, the legislative history, and the policies that 10(k) were intended to effectuate.

The court of appeals' 28-page opinion is a detailed and exhaustive analysis of the issue raised here. The court holds that the NLRB may not assert jurisdiction under Section 10(k) if the two unions (or groups of employees) involved in a jurisdictional dispute have agreed upon a voluntary adjustment procedure for settlement of the dispute. According to the court, this voluntary adjustment procedure may not be frustrated by an employer who refuses to participate in the procedure even though invited. The court was guided by this Court's opinion in *CBS* and the result reached is demanded by those policy considerations which prompted Congress to enact Section 10(k). Review in the instant case is therefore unwarranted for the Peti-

tioners are simply attempting to reopen basic policy questions closed in *CBS*.

1. One of the principal reasons which the NLRB proffers for this Court accepting certiorari is that the decision below overturns 23 years of consistent Board interpretation of the meaning of "parties" (Br. 10). But this argument hoists the Board on its own petard. All must agree that *CBS* totally rejected the basic premise upon which the Board had administered Section 10(k) since 1948. Yet as the court below recognized (App. A, 43), since *CBS* the Board has not analyzed its interpretation of "parties" with a view to whether or not that interpretation comports with the teaching of *CBS*. In the absence of such a re-analysis, the Board's interpretation of "parties" *necessarily rests on its pre-CBS doctrine* of the meaning and purpose of Section 10(k).[8] Thus, not only is the Board's "consistency" deserving of no special weight, but its obedience to "consistency" highlights the nature of the Board's error.[9]

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[8] As the court below recognized, "If there was room for doubt prior to *CBS* [regarding the definition of "parties"], that decision should have alerted the Board to modify its interpretation." (App. A, 41).

[9] The Board's consistency, as the court below pointed out is illusory. (App. A, 47). Under its own *Safeway* doctrine it quashes the notice of 10(k) hearing when one union renounces any claim to the work in dispute even though the employer still demands a hearing. *Highway Truckdrivers and Helpers, Local 107, Int'l. Bhd. of Teamsters (Safeway Stores, Inc.)*, 134 NLRB 1320 (1961). Similarly in *Local 1905, Carpet Linoleum and Soft Tile Layers (Butcher and Sweeney Const. Co.)*, 143 NLRB 251 (1963) the Board, *over the protest* of the employer, quashed a notice of 10(k) hearing when the disputing unions settled their dispute. See *Local 1102 United Brotherhood of Carpenters (Port Huron Sulphite and Paper Co.)*, 140 NLRB 79 (1962).

2. Notwithstanding *CBS* the Board still argues (Br. No. 11) that a 10(k) "dispute" really means a dispute between an employer and a union striking to obtain a work assignment and therefore, in the Board's view, the employer must be a "party" to any voluntary method of adjustment of the dispute. This is contrary to the plain meaning of the statute. As this Court stated in *CBS*:

> "[T]he clause 'the dispute out of which such unfair labor practice shall have arisen' can have no other meaning except a jurisdictional dispute under § 8(b)(4)(D) *which is a dispute between two or more groups of employees over which is entitled to do certain work for an employer.*" 364 U.S. at 579 (Emphasis added) (App. A, 36, 37).

The Board's argument also flies in the face of the last sentence of Section 10(k) (significantly omitted from the Board's quote (Br. No. 11)). That sentence states, "Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed." Since it is conceded that the employer is under no legal compulsion to comply with either a Board award or a voluntary adjustment between the unions (Bd. Br. 18), while *the unions* must comply in order to have the unfair labor practice charge dismissed, it irresistibly follows that only the unions are the "parties" to the dispute (App. A, 33).

3. Little need be said with regard to the Board's contention (and that of its supporters) that the decision below is inconsistent with legislative history (Br. 16). As Judge Leventhal recognizes, the opposite conclusion is the only one reasonably drawn from a review of the Congressional history of Section 10(k) (App. A, 38-

41). This Court in *CBS* analyzed the legislative history of Section 10(k) and its interpretation of the abstention provision of Section 10(k) was necessarily based upon that legislative history:

> "§ 10(k) offers strong inducement to quarrelling unions to settle their differences by directing dismissal of unfair labor practice charges upon voluntary adjustment of jurisdictional disputes." 364 U.S. at 577.

While Section 10(k) was not in the House Bill, H.R. 3020, the definition of a "jurisdictional dispute" as contained in Committee Reports, and as stated by President Truman, Senator Taft and several other members of both Houses [10] provided the framework for Senator Morse's proposed Section 10(k). For example, the House Report on H.R. 3020 stated:

> "Jurisdictional strikes usually involve quarrels, not between employers and employees, but between rival unions, . . ." H. Rep. No. 245 on H.R. 3020 (I Leg. Hist. 292, 315).

Also typical is President Truman's statement to Congress in 1947 that, "if the 'rival unions are unable to settle [jurisdictional] disputes themselves, provision must be made for peaceful and binding determination of the issues'." 364 U.S. at 580. Senator Murray, in urging adoption of Section 10(k) as proposed by Senator Morse stated:

> "We are confident that the mere threat of governmental action will have a beneficial effect in stimu-

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[10] 93 Cong. Rec. 136; II Legislative History of the Labor Management Relations Act, 1947, 1012 (Sen. Taft) (hereinafter, "Leg. Hist."); I Leg. Hist. 583 (Rep. Landis); H. Repr. No. 245 on H.R. 3020 (I Leg. Hist. 292, 315). See also II Leg. Hist. 1056 (Sen. Ellender) and I Leg. Hist. 615 (Rep. Hartley).

lating labor organizations to set up appropriate machinery for the settlement of such controversies within their own ranks, where they properly should be settled." II Leg. Hist. 1046; see also Sen. Min. Rep. No. 105 on S.1126; I Leg. Hist. 463, 480. (App. A, 41).[11]

4. Moreover, the Board and its supporters misconstrue the opinion of the court of appeals. The court did not hold, as the Board claims "that an employer is necessarily a neutral party in a jurisdictional dispute" (Br. 14.) The court held that an employer has standing to obtain a Section 10(k) hearing before the Board when he is faced with two disputing unions who cannot agree upon the proper assignment of the work. A Section 10(k) hearing is not warranted, however, merely because the employer is dissatisfied with the *way* the unions reach the settlement of their dispute.

Under the Board's reasoning, the employer is not just a "party", but a super party. The employer can wait to see the result of Joint Board proceeding (refusing to participate); then if the award does not accord with his own Motion, he refuses to assign the work to the prevailing union, files a Section 8(b)(4)(D) charge and takes a second bite at the apple in a Board 10(k) hearing. If the Labor Board does not go

[11] The Board's attempted rationalization of Senator Morse's statement regarding the scope of Section 10(k) (Br. 17) rests on a faulty premise. The very situation the Senator described which gave rise to the policy of the War Labor Board (and which he incorporated into Section 10(k)) involved a *strike* over a work assignment. II Leg. Hist. 983. It seems pointless to argue, as does the Board (Br. 17), that the unions, prior to a strike, are the "parties" to the dispute and can settle it without the employer, but then if one of the unions strikes to enforce that settlement, the Board won't recognize it because the employer wasn't involved.

along with him (a rare occurrence indeed), the employer simply ignores the Board's decision as well.[12]

But, it is the NLRB, not Congress, that is according employers such extraordinary rights. The clear Congressional intent was to insulate employers from the fallout of inter-union jurisdictional quarrels; it accomplished this in Section 10(k) by assuring "that at least the employer would not be plagued by the failure of the disputing unions to resolve their dispute." (App. A, 33).

The fears of disruption in the construction industry which the Board and the *amici* conjure up as a result of the lower court's decision are simply unfounded. Their own briefs demonstrate as much. This Court has not been informed of any widespread strike activity in support of Joint Board decisions or even of an unusual number of jurisdictional disputes since the opinion below was issued. The sole support for the rhetoric of disruption is that five lawsuits under Section 301 of the Act have been filed seeking enforcement of Joint Board awards (Lab. Br. 4); this *peaceful* and nondisruptive way to settle disputes would seem to cut against

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[12] Contrary to the Board, as a "practical matter," the employer is not "under compelling pressure" to accept a 10(k) determination. (Br. 18, 19) Under Board policy, during the long Board 10(k) and 8(b)(4)(D) proceedings, the employer is insulated from strike activity by a Section 10(1) injunction obtained by the NLRB. As this case demonstrates, by the time the 10(k) decision is issued the work involved will generally be completed and the dispute academic. (App. A, 34-36, App. D, 84, 93). Even when the prevailing union in a 10(k) case can take economic action against a construction employer, under the NLRB's strict common situs picketing rules of *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950), such action is severely restricted to insure that it does not violate the secondary boycott provisions of the Act. See *Local 761 IUE* v. *NLRB (General Electric)*, 366 U.S. 667.

the Board's position.[13] If anything, the lower court's opinion has already had a calming influence on unions involved in jurisdictional disputes. Furthermore, the NLRB's intervention in at least one of those lawsuits (*Plumbers' Local 157* v. *Laborers' Local 204, et al,* C.A. No. 70-C-109 (D.S.D. Ind.) suggests that other facets of this issue have not yet crystallized.

Other policy arguments of the Board and its supporters are equally unpersuasive. The lower court's opinion does not interfere with the Board's *Spielberg* doctrine of deferring to arbitration. *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955) (Lab. Br. 13). As Judge Leventhal patiently explained, the court's reasoning adopts the general principle of *Carey* v. *Westinghouse Corp.,* 375 U.S. 261 (1964), that "full scope should be given to voluntary arbitration procedures" (App. A, 45). Furthermore, the court below recognized that if the interunion voluntary adjustment procedures are subject to some "infirmity" or are just "paper agreements," the Board has discretion to reject them (App. A, 48, 49). That protection is adequate and that is not the situation here (App. A, 49).

Finally, no one, including the court below, denies that employers have an interest in the resolution of jurisdictional disputes. The Board and its supporters argue that a Joint Board decision could well upset established bargaining relationships, increase the costs to the employer, require him to employ different employees, etc.

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[13] The lower court's view on the peaceful enforcement of Joint Board awards under Section 301 of the Act is nothing new. In similar situations relief has been granted in suits between unions under Section 301 to enforce decisions of the AFL-CIO No Raiding Pact, *United Textile Workers of America* v. *Textile Workers Union of America,* 258 F. 2d 743 (7th Cir., 1958).

(Bd. Br. 14; Texas St. Br. 14; Lab. Br, 10, 16; AGC Br. 12),—but these considerations apply equally when the Board decides a jurisdictional dispute in a Section 10(k) proceeding. In any event, such considerations are plainly irrelevant to the issues presented in this case.[14]

III. The Operation of the Joint Board Is Not an Issue in This Case

Although the *amici* supporting the Board[15] and the Petitioner Texas State argue that the court below was wrong in its interpretation of the word "parties," their real attack is directed at the Joint Board.[16] For example, the *amici* supporting the Board allege that the

---

[14] Actually the only rationale the Board can offer in support of its interpretation of "parties" is its discredited pre-*CBS* approach that the employer has an absolute right to assign work as he sees fit. This Court in *CBS* rejected that rationale:

> "[S]uch a narrow determination would leave the broader problem of work assignments in the hands of the employer, exactly where it was before the enactment of § 10(k)—with the same old basic jurisdictional dispute likely continuing to vex him, . . ." 364 U.S. at 579.

[15] The Board and the Title Contractors' Ass'n., petitioned below for rehearing *en banc*, at which time several groups, including the Laborers' International Union and the Associated General Contractors, supported the request. Their Petitions were denied. None of the *amici curiae* supporting the Board participated in the court below until this petition for rehearing was filed, even though the existence of the case was well known to at least the Laborers and AGC. Further, the Tile Setters, who prevailed before the Board but lost in the court of appeals, has not filed a petition for certiorari or brief supporting the Board in this Court.

[16] This point is emphasized by the fact that although the lower court's opinion clearly applies to any inter-union voluntary method of settlement, it is only construction industry employers who have seen fit to enter the case.

Joint Board criteria is somehow unfair to employers and does not consider their interests in deciding disputes (Tex. St. Br. 18; AGC Br. 16).[17]

The problem with all these arguments is that they are not directed to the question presented by either Petition. As Judge Leventhal pointed out in his opinion, no contention was made by any party below that the Joint Board did not properly have jurisdiction to decide the instant dispute or that "the general operation of the Joint Board plan or . . . its handling of this particular inter-union dispute" was subject to "infirmity." (App. A, 49, 48, 31, n. 10). Texas State and the supporting *amici* are trying to use their dissatisfaction with the Joint Board—a dissatisfaction not shared by the preponderance of employers in the building and construction industry[18]—to show the statute should not be interpreted in conformity with Congressional intent. The Joint Board, however, *is* involved in the five or six court cases which the *amici* state have recently been filed, and it would appear desirable to give that litigation a chance to proceed so all issues will be in proper perspective for this Court should a conflict among the circuits eventually develop.

---

[17] Contrary to the Board and the supporting *amici*, the fact that employers are included in the Joint Board structure does not have any effect on the meaning and proper interpretation of Section 10(k) (Br. 14, 15). The presence of employers on the Joint Board actually supports the lower court because it guarantees that employers' viewpoints will be heard and considered.

[18] The Building and Construction Trades Department, AFL-CIO, is simultaneously filing a motion for leave to file a memorandum *amicus curiae* supporting this Respondent's Opposition. Since that Memorandum discusses various aspects of the Joint Board and the stability the decision below will bring to the construction industry, these matters will only be touched upon lightly here.

Also, the issues of the Joint Board agreement and its procedures are in reality simple contract questions readily resolved by lower courts in routine Section 301 suits. Unless those courts prove unable to handle these issues, this Court with its crowded docket should not burden itself with issues which have not traversed the lower court route.

It is suggested that the issue presented here should "percolate" in the lower courts until all phases have been explored and the application of the court's decision to varying factual patterns becomes clearly discernible.

CONCLUSION

The petitions for writs of certiorari in Nos. 1184 and 1231 should be denied.

Respectfully submitted,

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PATRICK C. O'DONOGHUE
DONALD J. CAPUANO
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Counsel for Respondent,
Plasterers' Local Union
No. 79

February, 1971

MAY 25 1971 Nos. ~~1184 and 1221~~ SUPREME COURT, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1184~~ 70-63

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PLASTERERS' UNION LOCAL 79, Operative Plasterer's and Cement Mason's International Association, AFL-CIO, et al.,

Respondent.

No. ~~1221~~ 70-65

TEXAS STATE TILE & TERRAZZO COMPANY, INC.,

Petitioner,

vs.

PLASTERERS' UNION LOCAL 79, Operative Plasterer's and Cement Mason's International Association, AFL-CIO, et al.,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF SCIENTIFIC APPARATUS MAKERS ASSOCIATION AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PLASTERERS' UNION LOCAL 79, Operative Plasterer's and Cement Mason's International Association, AFL-CIO, et al.,

Respondent.

No. 1231

TEXAS STATE TILE & TERRAZZO COMPANY, INC.,

Petitioner,

vs.

PLASTERERS' UNION LOCAL 79, Operative Plasterer's and Cement Mason's International Association, AFL-CIO, et al.,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Scientific Apparatus Makers Association, by its attorneys Edward H. Hatton, Chester T. Kamin, and Jenner & Block, moves for the entry of an order granting leave to file a brief *amicus curiae* in the above-captioned case.

Interest of the Amicus

Scientific Apparatus Makers Association has as members the major national manufacturers of scientific laboratory furniture and equipment. Installation of scientific facilities has been repeatedly interrupted by jurisdictional disputes in which members of the *amicus* have sought and obtained redress through the National Labor Relations Board.

The decision of this case is of compelling interest to the *amicus* because if the opinion of the Court of Appeals is sustained the ability of members of the *amicus* to end disputes and to do business with dispatch and at reasonable cost will be seriously abridged.

Reasons For Filing A Brief Amicus Curiae

Consents to the filing of a brief *amicus curiae* on behalf of Scientific Apparatus Makers Association have been given by the Solicitor General and two of the three private parties. These consents are attached as Exhibits A, B, and C to this motion. Respondent Plasterers' Union Local 79 has refused consent. A copy of its letter of refusal is attached as Exhibit D.

Scientific Apparatus Makers Association believes that its brief will shed light on certain economic realities in the construction industry and on the actual operation and conduct of the National Joint Board for the Settlement of Jurisdictional Disputes. These insights may be of assistance to the Court in reviewing the conclusion of the Court of Appeals that the employer has no interest in the outcome of a jurisdictional dispute and that the National Joint Board affords a workable tribunal for the voluntary resolution of jurisdictional disputes.

Respectfully submitted,

.....

ALBERT E. JENNER, JR.
One of the Attorneys for Scientific Apparatus Makers Association

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PLASTERERS' UNION LOCAL 79, Operative Plasterer's and Cement Mason's International Association, AFL-CIO, et al.,

Respondent.

No. 1231

TEXAS STATE TILE & TERRAZZO COMPANY, INC.,

Petitioner,

vs.

PLASTERERS' UNION LOCAL 79, Operative Plasterer's and Cement Mason's International Association, AFL-CIO, et al.,

Respondent.

BRIEF OF SCIENTIFIC APPARATUS MAKERS ASSOCIATION AS AMICUS CURIAE

Interest of the Amicus

Scientific Apparatus Makers Association has as members the major national manufacturers of scientific laboratory furniture and equipment. Over the past several years, members of the *amicus* have supplied and installed comprehensive scientific laboratories on hundreds of college and university campuses. Installation of these and other vital scientific facilities has been repeatedly interrupted by jurisdictional disputes.

No member of the *amicus* has agreed to be bound by decisions of the National Joint Board for the Settlement of Jurisdictional Disputes ("Joint Board"). Members of the *amicus* have recurrently relied on the intervention of the National Labor Relations Board ("NLRB") to obtain injunctions against work stoppages and subsequently to resolve the merits of the dispute. The decision of this case is of compelling interest to the *amicus* because if the opinion of the Court of Appeals is sustained the ability of its members to end disputes and to do business with dispatch and at reasonable cost will be seriously abridged.

ARGUMENT

I.

MANY EMPLOYERS HAVE AN INTENSE, PRACTICAL INTEREST IN THE OUTCOME OF JURISDICTIONAL DISPUTES.

The central conclusion of the Court of Appeals that the employer has no interest in jurisdictional disputes is at odds with reality.

In the scientific furniture industry, the employer typically contracts to supply and install its products. The installation is performed by specially trained carpenters who usually are regular employees dispatched to the construction site. The employers are parties to collective bargaining agreements with the carpenters union.

A jurisdictional dispute in this industry typically involves a challenge by another trade employed by a *different subcontractor*. If the competing trade successfully presses its claim, the employer suffers these consequences: 1) the flow of work planned for his employees is interrupted; 2) his regular employees may have to be temporarily laid off; 3) the inferior workmanship of the competing tradesmen must be corrected at his expense; 4) duplicate supervision is required because the competing trade insists on the presence of a supervisor who is associated with that trade and the employer cannot take the risk of removing his own supervisor; and 5) job satisfaction on the part of the architect and owner is impaired.

Whatever may be the case where both trades in a jurisdictional dispute are employed by a common employer, in the scientific furniture industry the employer is fighting for the right to use his own employees to accomplish the

work. If the employer is forced to use outside tradesmen who lack the necessary skills, tools, supervision and experience, quality and economy may suffer, with immediate consequences to trade reputation and profits. Accordingly, the employer's interest in the outcome of the dispute is most intense.

II.

IT IS UNFAIR TO FORCE AN EMPLOYER TO SUBMIT TO JOINT BOARD AWARDS.

The opinion of the Court of Appeals would require an employer to abide by a Joint Board award even though he has not agreed to do so. Many employers have refused to participate in or have withdrawn from the Joint Board because of highly questionable practices and awards.

In the scientific laboratory furniture industry, disputes have arisen over the installation of fume hood cabinets, which are fully enclosed areas at which a laboratory worker stands when dealing with toxic or noxious chemicals. Employers throughout the country uniformly assign the installation to their employees, who are carpenters. In 10(k) proceedings arising from claims to this work by sheet metal workers the NLRB has twice awarded the work to the carpenters in thorough, carefully reasoned decisions. *Local 408, SMWIA* (Metalab Equipment Co.), 49 NLRB 763, 57 LRRM 1388 (1964); *Local 299, SMWIA* (Metalab Equipment Co.) 173 NLRB No. 202, 70 LRRM 1011 (1968). Nevertheless, both before and after these NLRB decisions, the Sheet Metal Workers International Association has obtained dozens of awards of the identical work from the Joint Board. In making these awards the Joint Board has stated no reasons why the sheet metal trade is more appropriate. It is not unfair to suggest that this unbroken string of unsupported Joint Board decisions depends upon considerations other than the merits of the dispute.*

---

* *See* Comment, *The Employer as a Necessary Party to Voluntary Settlement of Work Assignment Disputes Under Section 10(k) of the NLRA,* 38 U.Chi.L.Rev. 389, 401-402 (1971).

It would be unfortunate to require employers to submit to interference with their ordinary work assignments simply because an aggressive competing trade has the ability to extract favorable decisions from the Joint Board.

If an employer elects to participate in the Joint Board and agrees to abide by its decisions, he cannot reasonably complain about the ways of that tribunal. If the employer chooses to stay clear of the Joint Board, it is most unfair to impose its decisions upon him.

It can be anticipated that many employers will not acquiesce in Joint Board decisions. If a 10(l) injunction against a work stoppage is outstanding, will the NLRB then move to dissolve the injunction and throw the recalcitrant employer back to the wolves? The decision below, if sustained, will not promote industrial peace, as contemplated by the framers of the Taft-Hartley Act, but rather it will intensify the underground warfare that presently plagues the construction industry.

Conclusion

Scientific Apparatus Makers Association, *amicus curiae*, respectfully requests that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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EDWARD H. HATTON
CHESTER T. KAMIN
Attorneys for Scientific Apparatus Makers Association

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135 South LaSalle Street
Chicago, Illinois 60603
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APPENDIX

APPENDIX

EXHIBIT A

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D.C. 20530

May 12, 1971

Chester T. Kamin, Esq.
135 South La Salle Street
Chicago, Illinois 60603

Re: NLRB v. Plasterers' Union Local 79, No. 1184, October Term, 1970
and
Texas State Tile and Terrazzo Company, Inc. v. Plasterers' Union Local 79, No. 1231, October Term, 1970

Dear Mr. Kamin,

In response to the request in your letter of May 10, I hereby consent to your filing a brief amicus curiae in the above-entitled case on behalf of the Scientific Apparatus Makers Association.

Very truly yours,

Erwin N. Griswold
Erwin N. Griswold
Solicitor General

EXHIBIT B

NOS. 1184 and 1231

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PLASTERERS' UNION LOCAL 79,

Respondent.

TEXAS STATE TILE AND TERRAZZO COMPANY, INC.,

Petitioner,

vs.

PLASTERERS' UNION LOCAL 79,

Respondent.

CONSENT TO FILING OF AMICUS CURIAE BRIEF

Texas State Tile and Terrazzo Company, Inc., and Tile Contractors Association of America, Inc., by their attorneys, hereby consent pursuant to Rule 42 of the Rules of the Supreme Court of the United States to the filing of a brief *amicus curiae* on behalf of Scientific Apparatus Makers Association.

Wayne S. Bishop
One of the Attorneys for Texas State Tile and Terrazzo Company, Inc., and Tile Contractors Association of America, Inc.

EXHIBIT C

NOS. 1184 and 1231

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PLASTERERS' UNION LOCAL 79,

Respondent.

TEXAS STATE TILE AND TERRAZZO COMPANY, INC.,

Petitioner,

vs.

PLASTERERS' UNION LOCAL 79,

Respondent.

CONSENT TO FILING OF AMICUS CURIAE BRIEF

Tile, Terrazzo and Marble Setters Local Union No. 20, Brick Layers, Masons, and Plasterers International Union, by its attorneys, hereby consents pursuant to Rule 42 of the Rules of the Supreme Court of the United States to the filing of a brief *amicus curiae* on behalf of Scientific Apparatus Makers Association.

Jerry D. Anker
One of the Attorneys for Tile, Terrazzo, and Marble Setters Local Union No. 20, Brick Layers, Masons, and Plasterers International Union

EXHIBIT D

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May 12, 1971

Chester T. Kamin, Esq.
Jenner & Block
135 South LaSalle Street
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Re: NLRB v. Plasterers' Local 79
Nos. 1184 and 1231
Supreme Court of the United States

Dear Mr. Kamin:

This will acknowledge your letter of May 10 requesting the consent of our client, Plasterers' Local 79 to the filing of an *amicus* brief by the Scientific Apparatus Makers Association.

We have refused consent to several other groups seeking to file *amicus* briefs in this case, and we cannot consent to your request.

Very truly yours,

Donald J. Capuano
Donald J. Capuano

DJC:cm

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SUPREME COURT, U. S.

Nos. 1184 and 1231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

PLASTERER'S LOCAL NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

No. 1231

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC., *Petitioners,*

v.

PLASTERER'S LOCAL NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, AS AMICUS CURIAE

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Proceedings of the 41st Convention, Building and Construction Trades Department (AFL), p. 117 (1948) 11

Proceedings of the 42nd Convention, Building and Construction Trades Department (AFL), pp. 143-5 (1949) 22

Proceedings of the 45th Convention, Building and Construction Trades Department (AFL), pp. 181-2 (1952) 26

Proceedings of the 55th Convention, Building and Construction Trades Department (AFL-CIO), p. 25 (1969) 22

Strand, *Jurisdictional Disputes in Construction: The Causes, the Joint Board, and the NLRB* (1961) ..6, 7, 8

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, the Laborers' International Union of North America, AFL-CIO, hereby moves for leave to file a brief *amicus* in support of the Petitions in Nos. 1184 and 1231. The Contractor-Petitioners in No. 1231 and the Solicitor General in No. 1184 have granted their consent. Counsel for Plasterers' Local 79 has refused consent.

INTEREST OF THE AMICUS

1. The Laborers' International Union, an organization chartered in 1903 by the American Federation of Labor, is presently an affiliate of the AFL-CIO, and is the largest per capita tax affiliate of its Building and Construction Trades Department. The Laborers' Union, with a membership in excess of 600,000, represents highly skilled, semi-skilled and unskilled employees engaged in all phase of building, heavy and highway, and utility construction. As a result of organizational activities, and through thousands of collective bargaining agreements, national and local in scope, the Laborers' Union represents the largest number of craftsmen employed on construction projects and is, therefore, most likely to be affected by the adverse consequences of the decision below.

2. Under provisions of the constitution of the Building and Construction Trades Department, the Laborers' International Union and all other *affiliated International Unions* are directed to utilize the procedures of the Plan for the Settlement of Jurisdictional Disputes ("Plan"), which operates through the medium of a Joint Board. The Plan, in clear and unequivocal terms, provides that its procedures and awards are binding

only on those employers who have filed stipulations signifying their intention to be bound. Following the long line of unwavering NLRB and court decisions, and consistent with the recognition and interpretation given by the parties to the Plan's provisions, the Laborers' International Union has historically maintained within the Building and Construction Trades Department that it is bound by determinations of the Joint Board only where the employer responsible for the work assignment has stipulated or otherwise bound himself to Joint Board procedures.

The court below, however, ruled for the first time that the employer is not a "party" to a work assignment dispute, and concluded that notwithstanding provisions in the Joint Board Plan requiring employer assent, as long as the disputing unions are bound by Joint Board procedures for the adjustment of the dispute, the Joint Board award is not only binding on the employer and both unions, but the NLRB is forever ousted of authority to hear and determine the merits of the dispute.

The decision below has thus totally disrupted the long-settled basis for accommodating Joint Board and NLRB 10(k) procedures, and by placing the Laborers historical position in jeopardy, the court has injected notions which are foreign to the vital interests of both management and labor alike.[1]

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[1] In addition to the NLRB, the two employers directly involved in the dispute, and the Plasterers' and Bricklayers and Tile Setters Unions (participating in the court below), on March 22 and March 29, 1971, this Court granted permission for the filing of briefs *amici* by the Mason Contractors' Association of America, the Associated General Contractors of America, the International Association of Wall and Ceiling Contractors, the National Roofing Contractors' Association, the National Utility Contractors' Association, the Building and Construction Trades Department, and the Laborers' International Union of North America.

3. In addition, as an affiliate of the Building and Construction Trades Department, with a General President who is a member of the Joint Board Negotiating Committee, and with an international vice-president who regulatorly sits as a member of the Joint Board, the Laborers' International Union has special interests and experience which are beyond the expertise of the immediate parties, and whose views would be of assistance to this Court in focusing more directly on the issues involved herein.

4. The vast majority of employers in the construction industry have not agreed to be bound by the procedures of the Joint Board. The vast majority of the employees in the construction industry represented by the Laborers' Union are employed by contractors who are members of the Associated General Contractors of America ("AGC"). In addition to the AGC, there are other major segments of the construction industry, such as the Mainline-Pipeline Industry,[2] the home building industry,[3] the plastering and masonry industries,[4] and the heavy and highway industry, which are not partici-

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[2] The Mainline-Pipeline Industry has never been subject to Joint Board procedures, notwithstanding the fact that the Laborers', Teamsters', Plumbers' and Operating Engineers' International Unions are parties to national bargaining agreements covering that industry. Here, jurisdictional disputes are resolved through a pipeline industry employer-union policy committee.

[3] Residential building is the largest branch of the construction industry and the National Association of Home Builders, whose membership annually performs the largest share of new residential construction throughout the United States, is not and never has been a party to the National Joint Board.

[4] The Mason Contractors' Association and the Contracting Plasterers and Lathing International Association withdrew from the Joint Board Plan on August 1, 1963, and November 11, 1963, respectively.

pants in the operations of the Joint Board, but which employ substantial numbers of construction craftsmen represented by the Laborers' Union.[5]

The Laborers' Union has local and national agreements with employers in all of the aforementioned industries. However, there are no employers with voice or vote on the Joint Board to represent the interests of the General Contractor, the principal employer of members of basic trade unions (which includes the Laborers), and thus, no assurance that the interests of the General Contractor and his laborer-employees will be preserved and protected in proceedings conducted by the Joint Board. To the contrary, all the present employer associations which participate on the Joint Board are specialty contractor groups which primarily employ mechanical trades, and these employers do not engage in general construction work, such as that engaged in by the AGC, where laborers represented by the Laborers' Union are regularly employed.

5. The decision below threatens the stability of collective bargaining relationships in the construction industry. Thus, in the six months which have elapsed since the court below denied the Board's Petition for Rehearing, the Plumbers' Union has filed seven lawsuits, and the Electricians' Union has filed one lawsuit, all against the Laborers' Union and those employers

[5] By conservative estimate, the following numbers of employees represented by the Laborers' International Union are employed by the following contractor associations: AGC employs approximately 250,000; Mason Contractors Association of America employs approximately 100,000; Contracting Plasterers and Lathing International Association employs approximately 10,000 to 15,000; the National Association of Home Builders employs approximately 125,000; and there are approximately 40,000 laborers employed in the Pipeline Industry.

whose work assignments are being disputed.[6] In all of these cases in which the plaintiff unions seek to enforce Joint Board awards, the employer was not stipulated to, or otherwise bound by Joint Board procedures and the Laborers' Union was the recipient of the employer's assignment pursuant to provisions of valid collective bargaining agreements which provided for the resolution of disputes by procedures *other than* those of the Joint Board. The decision below has thus spawned unwarranted litigation, the sole purpose of which is to disrupt established collective bargaining relationships and subject the employer and the employees' chosen representative to enormous financial liability.

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[6] *Plumbers' Local 157* v. *Laborers' Local 204 and L & K Contracting Co.*, (complaint filed Oct. 21, 1970), C.A. No. 70-C-109 (D.C.S.D. Ind.); *Plumbers' Local 162* v. *Laborers; Int'l Union and Laborers' Local 1410 and B.G. Danis, Inc.*, (complaint filed Dec 9, 1970), C.A. No. 3980 (D.C.S.D. Ohio); *Plumbers' Local 162* v. *Laborers' Int'l Union and Laborers; Local 1410 and Ohio Excavators, Inc.*, (complaint filed Dec. 9, 1970), C.A. No. 3979 (D.C.S.D. Ohio); *Plumbers; Local 129* v. *Laborers' Local 210 and Edward J. DeBartolo Corp.*, (complaint filed Dec. 14, 1970), C.A. No. 1970-580 (D.C.W.D.N.Y.); *Plumbers' Local 129* v. *Laborers; Local 91 and Albert Elia Bldg. Co.*, (complaint filed Dec. 14, 1970), C.A. No. 1970-581 (D.C.W.D.N.Y.); *Plumbers' Local 36* v. *Laborers' Local 210 and Herbert F. Darling, Inc.*, (complaint filed December 15, 1970), C.A. No. 1970-583 (D.C.W.D.N.Y.); *IBEW Local 648* v. *Laborers' Local 534 and Jones Construction Company, Inc.*, (complaint filed January 5, 1971), C.A. No. 7817 (D.C.S.D. Ohio); *Plumbers' Local 157* v. *Laborers' Local 204 and Oberholtzer Construction Co.*, (complaint filed March 31, 1971), CA. No. TH 71-C-32 (D.C.S.D. Ind.). In addition, a similar action was filed solely against a contractor to protest his work assignment to laborers: *Operating Eng'rs. Local 150* v. *Wild Masonry Co.*, (complaint filed Nov. 23, 1970), C.A. No. 70-C-2944 (D.C.N.D. Ill.).

CONCLUSION

For the foregoing reasons, the Laborers' International Union believes that it has sufficient interest in this proceeding and, accordingly, respectfully requests the Court to grant this motion for leave to file the accompanying brief *amicus* in support of the petitions.

Respectfully submitted,

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May 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

PLASTERER'S LOCAL NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

No. 1231

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC., *Petitioners,*

v.

PLASTERER'S LOCAL NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA AS AMICUS CURIAE

This brief *amicus* is filed by the Laborers' International Union of North America, AFL-CIO, contingent upon the Court's granting the foregoing Motion for Leave to File a Brief as *Amicus Curiae.*

The interest of Laborers' International Union appears on pp. i - v of the above-noted Motion, and is incorporated herein by reference.

SUMMARY OF ARGUMENT

The instant case involves the question of primary jurisdiction and supremacy where a direct conflict occurs between jurisdictional dispute awards rendered by the National Labor Relations Board ("NLRB") and the construction industry's private Plan for Settling Jurisdictional Disputes Nationally and Locally ("Plan") through the procedures of its Joint Board. The court below ruled that "the parties" to a jurisdictional dispute include only the disputing unions and not the employers whose work assignment generated the conflict, with the consequence that the NLRB "may not properly proceed to determine a jurisdictional dispute pursuant to § 10(k) when the disputing unions [but not the employer] have agreed to settle their dispute through binding arbitration." (A., 363).*

Unions in the construction industry have always had some form of dispute-resolving arrangements, but these procedures excluded employers from their operation. However, realizing that the NLRB would not defer to the unilaterally operated union procedures in administering § 10(k), the Building Trades Unions reluctantly agreed to establish "joint" procedures which would allow equal voice and vote to employers. Thus, since its inception in 1948, the Plan has expressly provided for *joint and equal representation, voice and vote to employers and union alike.* Furthermore, the Plan has always contained the provision that its provisions and the awards of the Joint Board will *not* be binding upon any employers until "they have signed a stipulation setting forth that they are willing to subscribe

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* The designation ("A") refers to portions of the printed record designated as the parties' Appendix.

to and be bound by the terms and conditions of this agreement." (A., 343).

In addition, the industry itself has consistently recognized that an employer is a "necessary party" in the resolution of any jurisdictional dispute. During the early 1950's, when the NLRB was threading its way in the development of a meaningful 10(k) policy, Professor Archibald Cox prepared and filed with the NLRB comprehensive briefs on behalf of the Joint Board. In these documents the Joint Board unequivocally expressed its view that where the NLRB receives evidence indicating that the employer is not bound by the Joint Board agreement, the NLRB must hold a hearing and render a determination under § 10 (k).

The decision of the court below overrules 20 years of unwavering NLRB interpretation, and directly undermines the entire corpus of arbitration law as carefully developed by this Court from *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957), through the *Steelworkers trilogy.*[1] Although federal policy favors binding arbitration as a means of promoting industrial stability, this Court made it clear in *Warrior & Gulf* that "a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. . . ." (363 U.S. at 582). Further, this court has noted that the NLRB, in the exercise of its sound administrative judgment, must examine the impact which private methods of adjustment may have on the public interest, and therefore "if by the time the dispute reaches the

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[1] *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

Board, arbitration has already taken place, the Board shows deference to the arbitral award, provided the procedure was a fair one and the results not repugnant to the Act."[2]

Accordingly, in determining under § 10(k) whether satisfactory evidence has been submitted which would indicate that the parties have agreed upon "methods for the voluntary adjustment of the dispute," the Labor Board has, in effect, applied the same standards enunciated in *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955), where the Board held that it would recognize awards of arbitrators if "[1] the proceedings appear to have been fair and regular, [2] all parties had agreed to be bound, and [3] the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act."

The interpretation which the NLRB has given to § 10(k) supports basic federal policy by (1) casting the NLRB in a central role whereby it is able to guide the development of appropriate procedures for the resolution of jurisdictional disputes, and (2) providing monitoring procedures to insure that "agreed-upon methods of adjustment" are, indeed, fair and regular and consistent with basic standards of due process.

Although the NLRB has encouraged the Joint Board to develop procedures which would comport with basic due process standards required of all arbitration bodies, the Joint Board has refused to heed the NLRB's invitation. The result has been substantial employer and union dissatisfaction with Joint Board procedures. At various times during its 22-year history, numerous unions and employer associations have withdrawn from

[2] *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 270-1 (1964).

the Joint Board Plan (the most recent occurring on September 30, 1969, when the AGC served its notice of termination). The basis for the underlying employer-union dissatisfaction varies, but several reasons cited have included: (a) Joint Board disregard for the provisions of the Plan, as evidenced by its routine assertion of jurisdiction over disputes in cases where it has been specifically advised that the employer is not stipulated or otherwise bound to its procedures; (b) notwithstanding provisions which require the Joint Board to give due regard to such factors as "efficiency and economy," most decisions are based upon archaic and unrealistic decisions of another era, resulting in Joint Board awards which reverse employer assignments in over 80% of the cases handled; and (c) although the Plan purports to provide equal representation to all segments of the construction industry, since the withdrawal by the AGC there have been no general contractors on the Joint Board who possess the interest or experience to properly represent the General Contractor and the employees who hold membership in basic trades unions and are employed in the three basic branches of the industry.

The court below was either unaware or indifferent to the myriad conflicts which were generated by its radical interpretation. Although suggesting that no problems inhere in seeking to enforce Joint Board awards against non-stipulated employers, the court was apparently unmindful of the fact that especially in the construction industry, the existence of a valid collective bargaining agreement is the *sine qua non* of industrial stability and employment security. Accordingly, if the decision below actually contemplates that the losing union should "renounce an assignment," what protection does it have when the employer commences his

own § 301 or §303 suit against that union for violating its collective bargaining agreement? And in the same circumstances, what protection is afforded to the renouncing union when employees file unfair labor practice charges, and commence individual lawsuits for the union's breach of its duty of fair representation. Further, if an employer is to cease recognizing the incumbent collective bargaining representative and replace the existing employees with members of a "stranger" union which received the Joint Board award, how is the NLRB to handle charges alleging that the replacement of employees violates § 8(a)(3), that the recognition of the "stranger" union violates § 8(a)(2), and that in the process there was a trampling on the "employees" established § 7 rights? These and other unsettling problems require this Court's attention, and summary reversal of the decision below.

ARGUMENT

A. THE EMPLOYER IS AN INDISPENSABLE "PARTY" IN JOINT BOARD PROCEEDINGS

1. Construction Industry Boards

Following the formation of the American Federation of Labor, the construction unions collectively developed numerous boards and panels to provide procedures for the settlement of jurisdictional disputes. Professor Strand[3] places the beginnings of formalized procedures with the formation of the National Building Trades Council in 1897. That Council, like all successor Boards developed during the next 20 years,

[3] The history and development of dispute-settling procedures in the Building and Construction industry is given detailed treatment in Strand, *Jurisdictional Disputes in Construction: The Causes, the Joint Board, and the NLRB*, 61 *et seq.* (1961).

operated strictly as an inter-union arrangement with no provisions being made for employer participation in any form. However, for an eight year period following World War I, the American Federation of Labor accepted a proposal outlined by the American Institute of Architects which, for the first time, permitted employers to participate in settlement procedures under the National Board for Jurisdictional Awards. This Board, which was undistinguished in its operations, "collapsed" in 1927 and the construction trades reverted to their previous inter-union settlement procedures. Although several different "Boards" emerged and dissolved during the early 1930's,[4] no significant changes occurred until the "Referee" system was established by the Building and Construction Trades Department, AFL, in 1936.

The "Referee" system for resolving jurisdictional disputes, like its predecessor Boards, was strictly an inter-union arrangement in which the union-approved "referee" was empowered to render final and binding decisions only on questions appealed to him by international unions affiliated with the Department. The system did not contemplate "permanent resolutions," as the Referee's decisions were limited solely to the particular job at which the dispute arose. Although various aspects of the procedures "rendered the Referee System ineffectual," [5] it lasted longer than any of

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[4] Professor Strand reports that following the "collapse" of the National Board for Jurisdictional Awards, a "weak" Board of Trade Claims operated for about five years—until the National Planning Adjustment Board (NPAB) was established under the National Industrial Recovery Act. The NPAB, however, functioned for slightly over one year until "declared invalid" by this court in *Schechter Poultry Corp.* v. *U.S.*, 295 U.S. 495 (1935). See Strand, *supra*, n.3 at 67.

[5] See Strand, *supra*, n.3 at 63.

the other boards or plans. On June 23, 1947, the Taft-Hartley Act was enacted into law. On July 9, 1947, the Building Trades Department suspended the Referee System "upon the legal advice that it violated the provisions of this act." [6]

2. The National Joint Board

Six months prior to the passage of the Taft-Hartley Act, the Executive Council of the Building and Construction Trades Department (hereafter Department) met with representatives of the Associated General Contractors of America (hereafter AGC) to consider a proposed agreement for the settlement of jurisdictional disputes. Under this arrangement, separate committees were to be established to resolve disputes arising in the three basic branches of the construction industry: (1) highway and utility construction work, (2) heavy construction work, and (3) building construction work. The proposal contemplated that these industry committees would be composed of an equal number of AGC and labor representatives from each branch of the industry. In addition, the plan also proposed that representation would be afforded to a national association and a labor representative serving the "specialized and subcontracting employers." The Plan provided for the creation of a National Joint Conference Committee which would attempt to resolve disputes referred to it by the various branch committees where settlement failed to occur at the local level.

The proposed Plan for joint operation had one major drawback. Instead of replacing the union controlled procedures, the then existing inter-union procedures were to be continued and resort thereto was mandatory in each dispute. As contemplated, the various com-

[6] Strand, *supra*, n.3 at 69.

mittees acquired jurisdiction to decide disputes only upon the mutual consent and submission of all of the "parties" who, under the Plan, were expressly recognized as being the unions affiliated with the Department *and the employers* affiliated with the AGC. Upon the passage of the Taft-Hartley Act, this proposed plan was dropped upon the suggestion by the AGC "that there be a Joint Committee of equal representation of employers and employees in the construction industry with an impartial chairman, created to render decisions on jurisdictional disputes. . . ."[7]

Thereafter, at its January 1948 meeting, the Executive Council of the Department, with the assistance of Professor John T. Dunlop and NLRB General Counsel Robert Denham, met with negotiating committees composed of employer-members of the AGC and various specialty contractor associations in an effort to devise a plan which would conform to the requirements of §§ 8(b)(4)(D) and 10(k) of the Act. These negotiations resulted in the establishment of a Plan for National Joint Board for Settlement of Jurisdictional Disputes which, as suggested by the NLRB, would be binding on those employers and unions who committed themselves to the Plan's procedures.[8] The new Plan

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[7] Report of Executive Council to 40th Annual Convention, Building Trades Department, p. 107 (1947).

[8] On Feb. 11, 1948, in an address to the AGC Convention, NLRB General Counsel Denham stated:

> . . . We of the [NLRB] have suggested to the Associated General Contractors, to the National Associations of Specialty Contractors, and to the officials of the labor organizations that are predominant in the field the desirability of working out among themselves, if possible, some joint procedure to which *both the labor organizations and the members of the various employer associations would be firmly committed.* . . . (Emphasis added) [21 LRRM 51 (1948)].

was executed by the Department, the AGC, and seven national associations of specialty contractors, and became effective May 1, 1948.

The 1948 Plan, which is substantially the same as the present Plan, established a Joint Board providing, as the name implies, *joint and equal representation, voice, and vote to employers and unions alike.* Hence, since its inception, the Plan has required that the Joint Board consist of an equal number of employers (further divided equally between General Contractors and Specialty Contractors) and unions (also equally divided between basic trade unions and specialty unions) and an "impartial chairman".[9]

In addition, throughout the Plan and the Joint Board's Procedural Rules, there is repeated reference to the word "parties," and there is no question but that the term includes the employer or his representative. For example, Article III, § 3, in dealing with the procedures for Hearings Panels and National Decisions, specifically requires the impartial umpire to notify all "na-

[9] Following the terms of the original Plan, the current Plan outlines the basis for appointment of employer representatives to the Joint Board and imposes upon the employers the obligation to assume 50% of the expenses incurred in the operations of the Joint Board. (Article II, § 1). Article II, § 4, further imposes upon the Joint Board the duty "to consider and decide cases of jurisdictional disputes in the building and construction industry, which disputes are referred to it by . . . an *employer directly affected by the dispute* on the work in which he is engaged or by a participating organization representing such employer." (Emphasis added) Parallel provisions are also included regarding representation, voice, vote, and allocation of expenses pertaining to the operations of the Appeals Board (Article II, §§ 2 and 5), and with regard to the conduct of Hearings Panels for National Decisions (Article III, §§ 2-7).

tional participating employers' associations" of the existing controversy in order that they might avail themselves of the provision which allows "*all parties* interested to intervene. Thirty days' notice shall be given of the date set for the hearing. Briefs shall be submitted and exchanged by *all parties to the dispute* at least 10 days prior to the hearing date." (Emphasis added.) Further, Article III, § 7, indicates that "any decision or interpretation by the Joint Board shall be immediately accepted and complied with by *all parties subject to this agreement* . . . ." and Article VI, § 1, specifies that the parties subject to the agreement are the Department and the employer signatories representing the specialty contractors' associations and the AGC.

Moreover, from 1948 to the present time, the express provisions of the Plan as well as the contemporaneous interpretation of the parties thereto have recognized that the Plan would be compatible with the statutory requirements of § 10(k) only so long as the employer responsible for the assignment of the disputed work specifically "stipulated" or otherwise assented to be bound by Joint Board decisions.[10]

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[10] At the time the Plan was adopted, Richard J. Gray, President of the Building Trades Department, announced to the delegates in convention assembled that "in order to take advantage of the Plan, contractors do not have to belong to one of the ratifying associations, but must employ members of unions affiliated with the Building and Construction Trades Department, *and must sign a stipulation agreeing to be bound by decisions of the National Joint Boards.*" (Emphasis added) 41st Annual Convention, Building Trades Department, p. 117 (1948).

Thus, Article V, § 5 of the original Plan and Article III, § 7 of the Plan in effect at the time of the instant dispute contain the following identical[11] provision:

> It is understood only those contractors who employ members of the organizations affiliated with the Building and Construction Trades Department of the AFL-CIO, shall be considered as bound by this agreement *when they have signed a stipulation* setting forth that they are willing to subscribe to and be bound by the terms and provisions of this agreement. (Emphasis added).[12]

The foregoing provisions of the Plan have also been restated, with additional elaboration, as part of the "Procedural Rules and Regulations of the National Joint Board":

> These procedures shall apply to:
>
> (a) Contractors who employ members of the organizations affiliated with the Building and Construction Trades Department, AFL-CIO, and *who have signed a stipulation* setting forth that they are *willing to be bound* by the terms of the agreement establishing the Joint Board, *or* who are members of a signatory association of contractors with *authority to bind* its members *or* who are parties to a collective bargaining agreement *providing* for the settlement of jurisdictional disputes under

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[11] The only language change was to substitute "AFL-CIO" for "A.F. of L." following the 1955 merger.

[12] On September 30, 1969, the AGC terminated the original Plan and withdrew from further negotiations. On April 7, 1970, a renegotiated Plan was executed between the Department and the "Participating [Specialty] Contractors' Employers' Associations." The identical provision appearing in the text which binds the Plan only to those contractors who "have signed a stipulation" was carried forward into the current Plan without change. (See Plan contained in "Green Book," Art. III, § 7, p. 10, 1970).

> the procedures herein set forth. (Emphasis added). (A., 343)

In addition to the foregoing provisions governing the operations of the Joint Board, the industry itself has consistently recognized that an employer is a "necessary party" in the resolution of any jurisdictional dispute. In the mid-1950's, the Labor Board had not yet finalized its views on the scope of 10(k) operations and the National Joint Board retained Professor Archibald Cox (later Solicitor General) to prepare and file with the NLRB comprehensive briefs on its behalf as *Amicus Curiae* in the *A. W. Lee,* 113 NLRB 947 (1955) and *Acoustical Contractors,* 119 NLRB 1345 (1958) cases. In these briefs, Professor Cox attempted to persuade the NLRB to alter its 10(k) procedures and proceed instead to decide jurisdictional dispute cases on their merits (as this Court ultimately ruled in *NLRB* v. *Radio and Television Broadcast Engineers Local 1212* ("CBS"), 364 U.S. 573 (1961)). Thus, Professor Cox urged that when a charge is filed alleging a violation of § 8(b)(4)(D), "if there is a *bona fide* question as to whether all parties are bound, a hearing should be held under § 10(k). If it is admitted that all parties are bound, or if the NLRB find them to be bound, there is satisfactory evidence that the parties have 'agreed upon methods for voluntary adjustment of the dispute' and the NLRB has no authority to proceed further under § 10(k)." [*Acoustical Contractors,* (Jt. Bd. Br. p. 23)]. On the other hand, when an 8(b)(4)(D) charge is filed "and there is no evidence that all parties are bound by the Joint Board Agreement, *the NLRB should hold a hearing and make a determination under §10(k).* The determination should be made on the merits of the jurisdictional dispute."

(Emphasis added) [*Acoustical Contractors,* (Jt. Bd. Br. p. 26)] [13]

The Laborers' International Union has maintained a consistent position within the Building Trades Department which comports with the aforementioned language of the Plan and the contemporaneous understanding of unions and employers in the construction industry, and its view has been consistently sustained by the NLRB.[14] Other affiliates of the Department have similarly maintained, both within the Department and successfully before the NLRB, that they are bound to the Joint Board only where the employer responsible for the assignment has voluntarily stipulated or agreed to be bound by the Plan.[15] Indeed, in the instant case,

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[13] Elsewhere in the Joint Board brief, Professor Cox made it eminently clear that employers were "parties" to the dispute and that the NLRB concededly had the duty to decide cases under Section 10(k) where the employer was not stipulated to utilize the Joint Board. Thus, "[T]o put the matter concretely, suppose that a general contractor not bound by the Joint Board Agreement assigns laborers to erect a twenty-foot self-supporting scaffolding. The carpenters would probably claim the work. *If they strike and a charge is filed, the NLRB must make a determination under Section 10(k).*" (Emphasis added). [*Acoustical Contractors,* (Jt. Bd. Br., p. 57)]. See also, excerpt of Joint Board Brief filed as Appendix to Respondent's Brief (pp. 1a-4a) in *NLRB* v. *Radio and Television Broadcasting Engineers Local 1212,* ("CBS"), 364 U.S. 573 (1961), No. 69, Oct. Term 1960.

[14] See, *e.g., Operating Engineers' Local 66 (Badolato and Son),* 135 NLRB 1392 (1962); *Metal Lathers' Local 46 (Precrete, Inc.),* 136 NLRB 1072 (1962); *United Association of Plumbers' Local 5 (Arthur Venneri Co.),* 145 NLRB 1580 (1964).

[15] Because of the provisions of Section 10(k) which require submission of satisfactory evidence that the parties have agreed upon a "voluntary" method of adjustment, unions have, therefore, recognized the supremacy of the statutory requirements, provisions of union constitutions to the contrary notwithstanding. For example,

the Tile Setters Union continued to defend before the NLRB and the court below its right to perform the work assigned to it by the Texas State Tile and Terrazzo Company ("Texas State") because that company had never assented to be bound by Joint Board procedures (A., 16, 22), and the NLRB therefore quite properly proceeded to determine the merits of the dispute as required by § 10(k) of the Act.[16] In reversing the NLRB, the court below, like the Joint Board itself, totally ignored those express provisions of the Plan which require employer stipulations; and by severing the employer's interests and assigning no role to the employer in the resolution of jurisdictional disputes, the court has, in effect, rewritten the Joint Board Plan and reinstituted the pre-1948 "Referee" system. Moreover, the effect of the court's erroneous interpretation is to totally disrupt settled NLRB procedures, to relegate the handling of all jurisdictional disputes to the Joint Board, and to forever foreclose any possible recourse by the employer or any other person to the procedures of § 10(k).

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in *Operating Engineers Local 450 (Rust Engineering Co.)*, 169 NLRB 1026 (1968), the NLRB noted that with respect to "outside" line work the International Brotherhood of Electrical Workers "has consistently refused participation in the NJB [National Joint Board], and we have in the past recognized this refusal." See also, *Mill Wrights Local 1862 (Jelco, Inc.)*, 184 NLRB No. 58, 74 LRRM 1485, 1486 (1970).

[16] In the instant case, the Plasterers' Union protested Texas State's assignment of the disputed work to Tile Setters by *picketing* and by submitting the matter to the Joint Board. In contesting the same assignment by Martini Tile and Terrazzo Company, the Plasterers' Union limited its protest to picketing; the merits of the dispute, however, were never submitted to, or considered by, the Joint Board. (A. 16-17).

B. THE DECISION BELOW UNDERMINES VOLUNTARY ARBITRATION PROCEDURES

In the 1960 *Steelworkers Trilogy*,[17] this Court declared that federal policy favored binding arbitration as a means of promoting industrial stability. This Court made it clear, however, that the duty to arbitrate arises only from the *voluntary* undertaking by a party agreeing to submit a particular matter to arbitration. Thus, in *Warrior & Gulf*, this Court stated:

> The Congress, however, has by § 301 of the Labor-Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached its promise to arbitrate. *For arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. . . . [T]he judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made.* (Emphasis added) 363 U.S. at 582.

By the same reasoning, it is submitted that Congress, by enacting § 10(k), sought "to interject the NLRB as the arbitrator of jurisdictional strikes" [18] and assigned to it the duty of determining (1) whether a voluntary method of adjustment exists and (2) whether all of the parties have voluntarily agreed to be bound by that method.

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[17] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[18] Note, *the Non-neutral Employer and Section 10(k) of the National Labor Relations Act*, 20 Catholic U. L.Rev., 343, 354 (1970).

Reference to the provisions of § 10(k) discloses that the NLRB is vested with discretion to determine whether the parties have submitted "to the Board *satisfactory evidence* that they have adjusted, or agreed upon methods for the *voluntary adjustment* of, the dispute. . . ." (Emphasis added). In exercising this discretion, the NLRB, faithful to congressional intent [19] and this Court's mandate in *CBS*,[20] has applied to Joint Board proceedings the same notions and standards which are generally applicable to other arbitral bodies. "If by the time the dispute reaches the Board, arbitration has already taken place, the Board shows deference to the arbitral award, provided the procedure was a fair one and the results not repugnant to the

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[19] See § 203(d) of the Act, 61 Stat. 154, 29 U.S.C. 173(d). See also comments of Senator Murray, "that full opportunity is given the parties to reach a *voluntary* accommodation without governmental intervention *if they so desire.*" (Emphasis added). 93 *Cong. Rec.* 4035, 2 *Leg. Hist. LMRA* 1046 (1947).

[20] In *NLRB* v. *Radio & Television Broadcast Engineers ("CBS")*, 364 U.S. 573 (1961), after ruling that the NLRB was required by § 10(k) to decide work assignment disputes on their merits, this Court stated (at 583):

> It is true that this forces the Board to exercise under § 10(k) powers which are broad and lacking in rigid standards to govern their application. But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes . . . . It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by *arbitrators*, unions, employers, *joint boards* and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. *Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.* (Emphasis added).

Act." *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 270-271 (1964).

Accordingly, in what has come to be known as the *Spielberg* doctrine, the Board held that it would recognize awards of arbitrators where "[1] the proceedings appear to have been fair and regular, [2] *all parties had agreed to be bound,* and [3] the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." (Emphasis added). *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). The foregoing standard reflects an effort by the NLRB to encourage the voluntary settlement of labor disputes through procedures which incorporate elementary principles of due process.[21] At the same time, where the arbitral process purports to bind a party who has never agreed "to give the arbitrator power to make the award"[22] or where the proceedings are "tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes of the Act,"[23] the Board is mandated

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[21] In *Retail Clerks Local 770* v. *Thriftmart, Inc.*, 59 Cal. 2d 421, 423-24, 380 P.2d 652, 655-56 (1963), Chief Judge Traynor held that due process prohibits enforcement of an arbitration award against a non-participating party.

[22] *United Steelworkers* v. *Warrior & Gulf*, 363 U.S. 574, 582 (1960). See also, *Retail Clerks Local 428* v. *L. Bloom Sons Co.*, 173 Cal. App. 2d 701, 703, 344 P.2d 51, 52-53 (1959), where the court rejected as "patently absurd [the] proposition that two parties can by contract effectively stipulate for the mode of determination of the rights of a third party who has not only not assented to such a mode of determination, but who also is not even accorded an opportunity to participate in such determination." See also, Note, *The Non-neutral Employer and Section 10(k) of the National Labor Relations Act*, 20 Catholic U. L.Rev. 343, 357 at n.90 (1970).

[23] *International Harvester Company*, 138 NLRB 923, 927 (1962).

to ignore the arbitral award and proceed to resolve the underlying dispute.[24] Although the Board's application of the *Spielberg* standards to diverse situations was viewed approvingly by this Court in *Carey* v. *Westinghouse,*[25] the court below, in overturning more than twenty years of NLRB experience and practice in dealing with jurisdictional disputes, displayed neither awareness nor concern that it was also overturning the entire corpus of NLRB-arbitration precedent.

C. FEDERAL POLICY FAVORS THE NATIONAL LABOR RELATIONS BOARD'S INTERPRETATION AND PROCEDURES

The interpretation which the court below has placed upon § 10(k) requires the NLRB to halt its processes and defer to "union agreements reached after the proceedings are begun." (A., 382-83). Such construction, however, misconceives and undermines the central role which the NLRB was expected to play in the development and uniform administration of our national labor policy. Indeed, while the NLRB's authority has uniformly been regarded as "exclusive" on matters falling within the coverage of the Act, by sub-

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[24] Section 10(a) of the Act, 29 U.S.C. 160(a) provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . . ." See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 267-8 (1940).

[25] *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 270-1, n.7 and 8 (1964). See also, *Smith* v. *Evening News Association*, 371 U.S. 195, 198, at n.6 (1962), where this Court observed that "the Board has, on prior occasions, declined to exercise its jurisdiction to deal with unfair labor practices in circumstances where, in its judgment, federal labor policy would best be served by leaving the parties to other processes of the law. See, e.g., *Consolidated Aircraft Corp.*, 47 NLRB 694; *Speilberg Mfg. Co.*, 112 NLRB 1080."

ordinating it to "union agreements," the court below places private settlements above the public interest which the Board alone was entrusted to protect. In addition, the court's construction strips the NLRB of its authority to provide uniformity in handling jurisdictional disputes which, under general notions of federal supremacy, the Board alone was expected to provide through centralized administration.[26]

Nevertheless, the NLRB has been a reluctant dragon of sorts in the jurisdictional arena: while it would have preferred Congress to place dispute-resolving mechanisms in the hands of arbitrators or private bodies, Congress deleted the provisions which would have authorized private arbitration "leaving it to the *Board alone* 'to hear and determine' the underlying jurisdictional dispute." (Emphasis added). (*CBS*, 364 U.S. 573, 581). Accordingly, in discharging its responsibilities, the NLRB has earnestly sought to effectuate congressional policy by developing standards and guidelines which will accommodate its undoubted 10(k) authority to private arbitration procedures. And it has endeavored to support Joint Board procedures by inviting the parties thereto to develop the kind of objective procedures which would comport with basic due process standards required of all arbitration bodies.[27]

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[26] The preemption doctrine recognizes the NLRB as the supreme and exclusive authority providing uniformity in labor matters, since "a multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 243 (1959), quoting from *Garner* v. *Teamsters' Union*, 346 U.S. 485, 471 (1953).

[27] See, e.g., *Plasterers', Local 65, (Twin City Tile and Marble Co.,)* 152 NLRB No. 1609, 1616 (1965) and *Millwrights, Local 1102 (Don Cartage)* 154 NLRB 513, 515-17 (1965).

The Joint Board, however, has refused to heed the NLRB's invitation and has adamantly continued in its practice of disregarding the provisions of its own arbitration Plan. Indeed, although the court below erroneously assumed that the Joint Board had no "infirmity that undercut its fairness and reliability as a method of achieving the industrial peace that is the legitimate objective of Congress" (A. 384-85); it was the Joint Board's consistent violation of its own procedures in rendering decisions over non-stipulated contractors that produced the recent impasse in Joint Board negotiations and caused the AGC to sever its twenty year relationship with the Plan. It was the same consistent practice which caused the Laborers' Union, one of the union members of the Joint Board negotiating committee, to vote against continuation of the present Plan. And it is because of Joint Board persistence in assuming the power to bind a non-assenting party in violation of its own rules that makes conflict between it and the NLRB inevitable.[28]

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[28] Since § 10(k) becomes operative only where a union engages in conduct violative of § 8(b)(4)(D), the hoped-for alternative to industrial strife which the Joint Board Plan was to provide has not been realized; and the inevitable conflict arises in those cases *where employers are not stipulated,* and the union successful before the Joint Board resorts to picketing and other self-help measures to enforce an award which the employer has no obligation to respect. See, *e.g., Bldg. & Constr. Trades Council (Charles J. Dorfman),* 173 NLRB No. 208, 69 LRRM 1594 (1968); *Plumbers Local 189 (R. W. Wander),* 176 NLRB No. 129, 71 LRRM 1340, 1341, n.2 (1969), where the Joint Board paid no heed to the pendency of § 10(k) proceedings and proceeded to hold the Laborers' Union in noncompliance notwithstanding the total lack of authority for the Joint Board's assumption of jurisdiction to issue the award in the first place.

1. Employer and Union Dissatisfaction With Joint Board.

Employer and union dissatisfaction with the operations of the Joint Board is not of recent vintage. On May 16, 1949, less than one year after the Plan had been in operation, the Executive Council of the Department voted to abolish the Joint Board and return to the union-controlled 1946 Plan. However, concern that the exclusion of employers from the Plan would cause contractors to submit all jurisdictional strike matters to the NLRB prompted a further extension of the Plan for another year.[29] From that time to the present, nearly every Joint Board negotiating session has involved "many serious controversies over the procedures and decisions of the Joint Board which have threatened its continuation."[30]

Although the reasons for employer dissatisfaction vary, a review of Joint Board decisions covering the 3-year period, 1968-70, discloses that the Joint Board has reversed employer assignments in over 80% of the cases. (Laborers' Appendix, *infra,* p. 1a). Unions too have presented specific and detailed complaints regarding Joint Board operations and, failing to achieve meaningful reforms, at one time or another the Electricians, Plumbers, Plasterers, Lathers, Bricklayers, Carpenters and Laborers' Unions all formally withdrew from the Joint Board Plan. And while all of these unions have, at various times, tacitly or expressly re-subscribed to the operations of the Plan, the

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[29] Proceedings of the 42nd Annual Convention of the Department, pp. 143-145 (1949).

[30] Report of President Haggerty to 55th Convention of the Department, p. 25 (1969).

Mason Contractors' Association and the Contracting Plasterers and Lathing International Association each permanently withdrew in 1963. Further, there has been no indication that the AGC, when it terminated the Plan and withdrew from further participation on September 30, 1969, had any intention of returning to a Joint Board structured along present lines.

2. Joint Board Ignores Efficiency and Economy.

In terms of the present Joint Board, the hoped-for improvement in Joint Board procedures which were heralded by the White House signing on February 2, 1965, has failed to materialize. Prior to its signing, the contractors negotiating with the Department expressed great concern over the Joint Board's continued adherence to archaic and unrealistic considerations without any regard for such factors as efficiency and economy or the interests of the consuming public.[31] Accordingly, instead of facing up to the issue of Joint

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[31] In rendering job decisions, § 7(a) of the Procedural Rules prescribes the order of priority to be followed by the Joint Board. (A. 344). The Joint Board must first decide each dispute on the basis of an applicable "decision of record." If none exists, then the governing criterion is an applicable "agreement of record." Thereafter, agreements between unions, trade practice and prevailing practice may apply. There are 84 "decisions of record" and 24 "agreements of record" reproduced in the "Green Book," more than 50% of which pre-date 1924. "In reality, therefore, the Joint Board resolves jurisdictional disputes by using standards that are approximately 40 years old, although the methods and materials used in the construction industry have advanced during this time span." Note, *The Non-neutral Employer and Section 10(k) of the National Labor Relations Act*, 20 Catholic U. L.Rev. 343, 356 (1970).

Board reform, the Department agreed to add the following provision to the 1965 Plan [Article III, § 1(f)]:

> The Joint Board should not ignore the interests of the consumer in settling jurisdictional disputes, but should give due regard to such factors as efficiency and economy of operation. (A., 348-349)

The above-quoted language, however, is nothing more than rhetorical gloss because, as previously noted, under the Procedural Rules of the Joint Board, there is virtually no way for the Joint Board to avoid predicating its awards upon ancient and largely irrelevant decisions or agreements of record.[32] If the Department was intent upon recognizing the interests of the consumer and requiring such factors as efficiency and economy to be considered in the rendering of job decisions, it would have been an easy matter to include such factors in the mandatory list of criteria which, under § 7(a), the Joint Board is bound to follow. However, the Joint Board's studied refusal to provide any reasoned explanation for its decisions, and the inclusion of "efficiency and economy" merely as negative matter which the Joint Board "should not ignore," has led the Court of Appeals for the Second Circuit to the conclusion "that this Joint Board gives little weight to considerations of economy and efficiency, and that past practice is usually held determinative."[33] Thus, contrary to the court below, there *is* an inherent infirmity in a procedure which purports to allow for considerations of efficiency and economy but which, in fact, are beyond application.

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[32] See Procedural Rules, § 7(a), (A. 344), and *supra*, note 31.

[33] *NLRB* v. *Local 25, Electrical Workers*, 396 F.2d 591, 594 (2nd Cir. 1968).

3. General Contractors Are Not Represented on the Joint Board

The Department, in response to the Laborers' motion and in its brief in opposition to the petitions herein, erroneously stated that "general contractors continue as parties to the current Plan and the Joint Board" (p. 2), and in an appendix to its brief, the Department lists the names of the thirteen Participating Contractors-Employers Associations which presently are signatory to the Plan, regarding which the Department asserts: "five are employers of the basic trades." (p. 3). Contrary to the statement of the Department, virtually every contractor of any size will, from time to time and in differing degrees, employ members of the five basic trades—Carpenters, Teamsters, Laborers, Bricklayers and Operating Engineers. Indeed, while there is no question that organized plumbing contractors are "specialty contractors" who deal almost exclusively with the Plumbers' Union for their employees, it is not at all uncommon for such plumbing contractors to employ members of the Laborers' Union, both in their shops as well as on their on-site utility installation crews. However, the employment of laborers or members of the other basic trades from time to time with regard to certain limited tasks does not convert a "specialty contractor" into a "general contractor."

As Professor Dunlop noted:

> The fact that some unions work exclusively, as a matter of policy or custom, for particular contractors, tends to convert competition among contractors also into jurisdictional disputes between unions. If a contractor is to hire such a craft he must also hire a sub-contractor. More accurately, the dispute is between a contractor and union on

> one side against another contractor and union on the other side." [34]

The "specialty contractors" invariably perform work pursuant to a sub-contract received from a general contractor. The NCA contractors happen to be "specialty contractors" who engage to construct large industrial complexes such as steel plants and chemical and petroleum refining installations. Such contractors, however, do not represent the large bulk of construction employees[35] and, by virtue of the relatively restricted nature of the work they have historically engaged to perform, specialty contractors would bring to Joint Board deliberations a very limited interest and experience with regard to the kinds of problems that general contractors face daily in the building, heavy and highway branches. Similarly, the general contractors' vast experience and knowledge of the three basic branches of the construction industry would not necessarily equip them to render realistic solutions to the problems of specialty contractors and their specialty

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[34] J. Dunlop, *Jurisdictional Disputes*, New York Univ., Second Annual Conf. on Labor, 486 (1949).

[35] John J. O'Donnell, former president of the NCA, in an address to the 45th Convention of the Department, pp. 181-2 (1952), stated that during the ten-year period from 1942 through 1952 "our average annual employment of American Federation of Labor craftsmen in this country alone . . . has been in excess of 60,000 workers." By way of contrast, more than 250,000 Laborers alone are employed by general contractors holding membership in the AGC, and this figure would conservatively be doubled at a minimum with regard to the employment of members of the remaining four basic trades. The Bureau of Labor Statistics reports that during 1968, there were 2,452,000 members of AFL-CIO unions engaged in "contract construction (building and special trade)." BNA, Labor Rel. Yearbook, 507 (1970).

employees.[36] It is thus apparent that while the Joint Board purports to be structured to provide equal representation for all segments of the industry, there are, in fact, no employers on the Joint Board whose voice or vote represents the interests of the general contractor and his laborer-employees. Yet, by the reasoning of the court below, the votes emanating from "specialty" employers and unions sitting as *the* Joint Board will effectively bind general contractors and the Laborers' Union, along with all other basic trades unions, to awards which may have no realistic relationship to the interests and conditions of the "non-specialty" segments of the construction industry.

D. THE DECISION BELOW DISRUPTS ESTABLISHED COLLECTIVE BARGAINING RELATIONSHIPS AND CONFLICTS WITH OTHER STATUTORY PROVISIONS

The Laborers' Union is typical of many of the unions in the construction industry in that it, and its affiliates, are signatory to thousands of collective bargaining agreements (national and local in scope) covering hundreds of thousands of employees. Most of these agreements do not contain provisions requiring resort to

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[36] But cf. Report of Executive Council to 40th Annual Convention of the Building Trades Department, 104-107 (1947), where the responsibility for draftsmanship and negotiations of the pre-Taft-Hartley "National Joint Conference Committee" was primarily relegated to the AGC and the employers representing the three basic branches of the general contractors' operations. Indeed, even the current 1970 Plan, adopted after the AGC withdrew from the Joint Board, still requires that the voting employer-members represent the following industries: "(1) industrial, (2) commercial, (3) *heavy and highway* and (4) residential." (Emphasis added.) Nevertheless, none of the thirteen Participating Contractors Employers' Associations listed in the Appendix to the Department's brief is engaged in the "heavy and highway" industry.

the procedures of the Joint Board in the event a dispute arises over an employer's work assignment. Accordingly, even though the Joint Board concedes that it "does not consider—or even inquire into—the contractual relationship of the affected parties," [37] prior to the instant case, employers who had not stipulated to be bound by Joint Board procedures could ignore its awards and seek relief through any applicable contractual procedures or by resort to § 10(k). However, under the reasoning of the court below, regardless what the parties to the collective bargaining agreement negotiated, Joint Board procedures and awards are now to be engrafted upon the parties' understandings by operation of law. Thus, while Congress has circumscribed the Labor Board's authority and denied it the power to write the terms of a collective bargaining agreement,[38] the court below, by judicial fiat, in effect has extended such powers to the members of the Joint Board.

Further, the court below embraced the Joint Board in the belief that it alone could provide "permanent" resolution of work assignment disputes because the NLRB has no authority "to compel an employer to change his assignment or a union to renounce an assignment that the employer is willing to give." [39] (A., 386).

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[37] See letter of November 16, 1970, from William J. Cour, Chairman National Joint Board, to Martin F. O'Donoghue, Esq. (Laborers' Appendix, *infra*, pp. 1a-3a).

[38] *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970); *NLRB* v. *Insurance Agents*, 36 U.S. 477, 487 (1960); *NLRB* v. *American Ins. Co.*, 343 U.S. 395, 404 (1952).

[39] Two recent law review notes have criticized the decision of the court below. In commenting upon the court's statement that the employer is not bound by a § 10(k) determination, one writer suggested that "conceivably an employer's noncompliance could

Aside from the fact that Joint Board awards provide no real permanency because each award is limited to the "particular job only," [40] the inherent defect in the foregoing rationale is that the decisions of the Joint Board, or any other private tribunal, will be equally ineffective in compelling a *non-stipulated* employer to change his assignment.

Moreover, it has never been definitively settled that the NLRB's § 10(k) award is without binding force or effect upon the employer. In *Auto Workers* v. *Scofield*, 382 U.S. 205 (1965), this Court noted that under the NLRB Rules and Regulations [29 C.F.R. § 102.8 (1965)], once the Board's "proceeding reached the adjudicative stage . . . the charging party is accorded formal recognition: he participates in the hearings as a 'party'; he may call witnesses and cross-examine others, may file exceptions to any order of the Trial

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be the basis for an unfair labor practice charge against the employer under 8(a)(1), (2), (3), or (5), but the Board has never considered such noncompliance to violate these sections." Note, *The Employer as a Necessary Party to Voluntary Settlement of Work Assignment Disputes Under § 10(k) of the NLRA*, 38 U. Chi. L. Rev. 389, 394 n. 32 (1971). Another writer has suggested that an employer, not otherwise bound to a voluntary method of adjustment, would be bound by a 10(k) award on the theory that federal policy would imply the dispute-resolving procedures of § 10(k) into the parties' collective bargaining agreement as a matter of law. Note, *The Non-neutral Employer and Section 10(k) of the National Labor Relations Act*, 20 Catholic U. L. Rev. 343, 354-55 (1970).

[40] The Procedural Rules and Regulations of the Joint Board provide: "each job decision of the Joint Board shall state that the job decision was predicated upon the particular facts and evidence before the Joint Board regarding the dispute and *shall be effective on a particular job only.*" (Emphasis added) (A., 344). The Joint Board award issued in the instant case was similarly restricted to "this particular job only." (A., 316).

Examiner [or hearing officer] and may file a petition for reconsideration to a Board Order. . . . Of course, if the Board *dismisses the complaint,* he can obtain review as a person aggrieved, which serves the 'public interest' by guaranteeing that the Board interpretation of the relevant provisions accords with the intent of Congress." (Emphasis added) (382 U.S. at 219). Thus, following the conduct of a 10(k) hearing upon an employer's 8(b)(4)(D) charge, if the Labor Board should dismiss any complaint predicated on such charge, the employer would be a "person aggrieved" within the meaning of § 10(f) of the Act [29 U.S.C.A. § 160(f)], possessing the right to obtain appellate review.[41]

Although a court proceeding under § 301 of the Act (29 U.S.C. 185) might decree that the successful union before the Joint Board is entitled to perform specified work and the losing union is not (which is precisely what NLRB determinations under § 10(k) presently provide) with all due deference to the dictum of the learned court below, there does not appear to be any legally enforceable way to require a non-stipulated employer to honor the Joint Board award or any subsequent court decree, or to employ members of the successful union.[42] Further, if the court below actually

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[41] And see particularly, *Transportation-Communication Employees Union* v. *Union Pacific Railroad Company*, 385 U.S. 157, 168 (1966), and dissenting opinion at 179, n. 10.

[42] Of the nine cases which have been instituted to enforce Joint Board awards against the non-stipulated contractor (and the union representing his employees) (cited *supra,* n. 6, in the attached Motion for Leave to File this Brief, *amicus curiae*), only one decision has issued. Chief Judge Weinman of the Southern District of Ohio, on May 5, 1971, granted the motion of the employer, B.G.

contemplates that the losing union should "renounce an assigment," what protection does it have when the employer commences his own § 301 or § 303 suit against the union for violating its collective bargaining agreement?[43] And in the same circumstances, what protection is afforded to the renouncing union when employees file unfair labor practice charges, and commence individual lawsuits for the union's breach of its duty of fair representation and for removing the beneficial provisions of their collective bargaining agreement?[44] Further, if an employer is to cease recognizing the incumbent collective bargaining representative and replace the existing employees with members of a "stranger" union which received the Joint Board award, how is the NLRB to handle charges alleging

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Danis Co., Inc., to dismiss it as a party to the action on the ground that since the employer was not stipulated to th eJoint Board:

> "The defendant contractor had no legal obligation to abide by the decisions of the Board established by the unions. Since the defendant contractor was protecting its legitimate business interests and exercising its legitimate right not to be bound by a contract to which it was not a party, its failure to adhere to the decision of the Board was completely justified and its failure to adhere to the Board's decision does not constitute an act of tortious interference with a contract." BNA Daily Lab. Rep. No. 96, A-3 (5/18/71).

[43] As this Court recognized in *CBS*, there is no requirement for "... 'substantive symmetry' between § 303(a)(4) on the one hand, and §§ 8(b)(4)(D) on the other," and specifically noted that it "has recognized the separate and distinct nature of these two approaches to the problem of handling jurisdictional strikes (citing *Juneau Spruce*)." [364 U.S. 573, 584-5 (1961.]

[44] The likelihood of requiring answers to the textual questions is supported by *Smith* v. *Evening News*, 371 U.S. 195, 200 (1962); *Local 12, Rubber Workers* v. *NLRB*, 368 F.2d 12, 22 (5th Cir. 1956), cert. denied, 389 U.S. 837 (1967); *Vaca* v. *Sipes*, 386 U.S. 171 (1967). Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 176 (1957).

that the replacement of employees violates § 8(a)(3), that the recognition of the "stranger" union violates § 8(a)(2), and that in the process there was a trampling on the "employees'" established § 7 rights?[45] Although the NLRB has been careful in the preparation of its post-*CBS* 10(k) determinations to ensure that the work is awarded to *employees* represented by a particular union, rather than the union itself,[46] and

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[45] Professor Cox, in the *amicus curiae* brief submitted on behalf of the National Joint Board to the NLRB in *Acoustical Contractors*, 119 NLRB 1345 (1958) recognized that if jurisdictional awards by the NLRB were to require employer recognition without first having a determination that the union represented the employees, there would be direct violation of the substantive provisions of § 8(a) and (b) of the Act. Thus, in attempting to provide a rationale, Professor Cox cited the following illustration of a dispute over the unloading of electrical equipment between the Operating Engineers Union and the Electrical Workers Union.

> "The NLRB could not properly assign the work to the members of either union, but in the absence of agreement to submit the issue to the Joint Board it could, and should, determine whether the work was to be done by men who follow the trade of operating engineer or the calling of electrician. If all the employees are union members the distinction may seem to lack practical significance. Legally the difference is highly important. Awarding the work to electricians would leave the contractor free to employ any non-union man who had the craft qualifications and was currently following that calling. The decision, therefore, would not violate the policies of §§ 8(a)(3) or 8(b)(2); it would do nothing to spread unlawful closed or union shop conditions."

[*Acoustical Contractors* (Jt. Bd. Br. p. 62)]. See also, excerpt of Joint Board brief filed as appendix to Respondent's Brief (pp. 1a-4a) in *NLRB* v. *Radio and Television Broadcast Engineers, Local 1212 ("CBS")*, 364 U.S. 573 (1961), No. 69, Oct. Term, 1960.

[46] E.g., in the instant case the Labor Board's determination was to "the employees of Texas Tile and Martini, who are represented by the Tile Setters, but not to that Union or its members." (A., 23).

while the basis for such care derives from the NLRB's express recognition of the limitations imposed by § 8(a) and (b),[47] the court below apparently was either unaware or unconcerned that virtually insoluble conflicts for unions, employers and the NLRB were being created by the simplistic pronouncement that Joint Board awards would be readily enforceable. The unwarranted litigation which the decision below has already spawned can, and should be checked by this Court's declaration that the decision below was in error.

CONCLUSION

For the above-noted reasons, as well as those stated by the Petitioners in Nos. 1231 and 1134, the decision below should be reversed.

Respectfully submitted,

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[47] *Lathers' Local 173 (Newark and Essex Plastering Co.)*, 121 NLRB No. 137, 42 LRRM 1519, 1522-23, and n. 47 (1958). Further, in testimony before the Senate Committee on Labor and Public Welfare considering proposed revisions of the Taft-Hartley Act, 83d Cong., 1st Sess., 2418 (1953), Professor Cox suggested specific statutory amendments to §§ 8(b)(4)(D) and 10(k). The specific changes would, *inter alia*, require the NLRB to make determinations under § 10(k) on the merits of the dispute and "the Board's determination of such a dispute shall identify the craft or trade to which the work is awarded by reference to the labor organization, *except as provided in § 8(a)(3) hereof.*" (Emphasis added) (at p. 2431).

APPENDIX

Joint Board Cases Decided for and Against Contractors' Assignment by Class of Contractor 1968-70

	Employer's Assignment	
	Supported	Reversed
General Contractors	29.5%	70.5%
Utility Contractors	22.2%	77.8%
Plastering Contractors	20.0%	80.0%
Masonry Contractors	11.7%	88.3%
Roofing	4.6%	95.4%
All Other Contractors	14.6%	85.4%
TOTAL CASES	19.4%	80.6%

SOURCE: Joint Board Minutes, 1968—September 1970.

National Joint Board for Settlement of Jurisdictional Disputes
Building and Construction Industry

815 Sixteenth Street, N. W.,
Washington, D. C. 20006
STerling 3-6817

November 16, 1970

In Reply Refer to:
IND 9/11/70

Martin F. O'Donoghue, Esq.
O'Donoghus & O'Donoghue
1912 Sunderland Place N. W.
Washington, D. C. 20036

Dear Mr. O'Donoghue:

This will acknowledge and reply to your letter of November 10, 1970 regarding certain relationships between a contractor and a union which has been awarded work as the result of a proceeding before the National Joint Board for the Settlement of Jurisdictional Disputes and reflected

in a job decision from that Board. While your letter makes reference to a specific dispute, Indiana 9/11/70, our reply to your questions is directed to any such dispute and is applicable whether or not the contractor may be stipulated or nonstipulated.

The Joint Board does not consider—or even inquire into—the contractual relationship of the affected parties. We know from experience, however, that the responsible contractor may have a formal contractual relationship with one, both or neither of the disputing unions. The presence or absence of a contract is of no concern to the Joint Board, except to the extent that we ascertain that the unions involved are affiliated with the Building and Construction Trades Department, AFL-CIO, and that the work in dispute is work within the building and construction industry.

A union which receives a decision from the National Joint Board is expected to furnish qualified workmen to the contractor responsible for the performance of the work specified in the job decision. This statement refers to the direct referral of men without any provision for further subcontracting. It also refers to the fact that the union shall refer as many or as few men as the contractor needs for the performance of the disputed work. The Joint Board does not specify the number of men a contractor shall employ for any given task or operation. In practice a complying contractor will usually replace those employees who were performing the disputed work prior to a job decision with an identical number of employees to be furnished by the union to which the work covered in the job decision was awarded.

There is no requirement under the policies or the Procedural Rules of the National Joint Board for a contractor to sign a contract with the union to which the work in a Joint Board job decision is awarded. The contractor, of course, is expected to pay the wage rates and comply with

the working conditions of the union to which the work was awarded. Refusal by the union to supply men in accordance with the above will result in a notice from the Joint Board to the contractor to proceed with the work in accordance with the original assignment.

Very truly yours,

WILLIAM J. COUR
William J. Cour,
Chairman

WJC/lp

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184 and 1231

No. 1184

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

No. 1231

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC., PETITIONERS,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Rule 42(3) of the Rules of this Court, the following contractor associations—Associated General Contractors of America, International Association of Wall & Ceiling Contractors, Mason Contractors Association of America, National Roofing Contractors Association, and National Utility Contractors Association—move for leave to file the attached brief amicus curiae in this case. Counsel for the amici have sought the consent of the parties involved: attorneys for the petitioners consented, but the attorneys for respondent refused.

INTERESTS OF THE AMICI

1. The amici here are all national associations representing contractors in various phases of the construction industry. The Associated General Contractors of America ("AGC" herein) represents approximately 9,000 general construction contractors who perform contracts in the amount of approximately $75,000,000,000 per year. The other amici represent approximately 3,000 contractors providing specialized construction, usually as subcontractors, at all kinds of construction projects: the International Association of Wall & Ceiling Contractors represents more than 450 contractors involved in the application of wall and ceiling systems; the Mason Contractors Association represents more than 1500 masonry contractors, who annually perform contracts for masonry construction in excess of $750,000,000; the National Roofing Contractors Association represents 600 contractors who perform the bulk of all roofing construction in the country; and the National Utility Contractors Association represents approximately 400 contractors engaged in the construction of underground utility lines and other utility construction projects.

2. These amici have a particularly vital interest in the issue presented here. The building and construction industry is a highly unionized industry, and is the primary source of strikes involving jurisdictional disputes. Sta-

tistics of the National Labor Relations Board show that during the last fiscal year approximately 66 percent of all unfair labor practice charges in jurisdictional dispute cases arose in the construction industry. 34 NLRB Ann. Rep. 204-205 (1969). Each of the amici and their constituent members have been involved, and currently are involved, in innumerable jurisdictional disputes with various building trades craft unions. The resolution of these disputes are of vital concern to construction industry contractors because their economic existence is to a substantial degree affected by the outcome of these disputes and their speedy resolution.

3. The issue presented in this case is the proper interpretation of the jurisdictional dispute provisions of the National Labor Relations Act. The court below overturned the settled construction of the Act which the NLRB had consistently given for more than 20 years, and held that the NLRB had no authority under Section 10(k) of the Act (29 U.S.C. § 160(k)) to determine a jurisdictional dispute where the unions involved in the dispute had agreed between themselves, and without the agreement or consent of the employer, to be bound by a voluntary method of adjustment of the dispute. Petitioners question the validity of that holding here, contending that the employer must also agree to be bound by any such voluntary adjustment before the NLRB is ousted of jurisdiction.

4. The decision of the court below presents grave problems for construction industry employers. The effect of the court's decision is to place the resolution of all disputes over an employer's work assignments solely in the hands of the unions involved and whatever dispute-settling machinery they wish to establish. In the construction industry, nearly all building trades craft unions are bound to submit such disputes to the National Joint Board, a body created by the Building Trades Department of the AFL-CIO. This Joint Board has consistently sub-

ordinated factors essential to the operation of a contractor's business (economy, efficiency, ability, etc.) to reliance upon ancient and outmoded inter-union agreements or decisions of record, many dated back to the early 1900's. Thus, its decisions do not fairly consider essential managerial considerations, and therefore, fail to reflect economic realities. Despite efforts on the part of the AGC and other employer groups to effect changes in the Joint Board to reflect managerial considerations, the Joint Board has failed to do so. Accordingly, many employer groups (including all of the amici here) have withdrawn from or have refused to participate in the Joint Board plan, and are not stipulated to the current Joint Board. Despite this fact, the court's decision requires employers, whether they are stipulated to the Joint Board or not, to accept its work-assignment resolutions.

5. The amici urge that the court's decision is contrary to the intent of Congress, and reflects the court's misconception of the nature of jurisdictional disputes as understood by Congress and as recognized by industry, employer and union alike, as well. The amici urge that they, as national associations for general contractors, subcontractors, and specialty contractors, and particularly because of the AGC's primary role in the formation and development of the National Joint Board, are uniquely qualified to present the position of the construction industry on the important issue raised in this case.

CONCLUSION

For the foregoing reasons, the amici herein respectfully request the Court to grant this motion for leave to file the attached brief amicus curiae in support of the position of petitioners.

Respectfully submitted,

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May 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

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v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INTERNATIONAL ASSOCIATION OF WALL & CEILING CONTRACTORS, MASON CONTRACTORS ASSOCIATION OF AMERICA, NATIONAL ROOFING CONTRACTORS ASSOCIATION, AND NATIONAL UTILITY CONTRACTORS ASSOCIATION.

INTERESTS OF THE AMICI

This brief is submitted pursuant to Rule 42 of the Rules of this Court, subject to the Court's granting of the attached Motion for Leave to File a Brief as Amicus Curiae. The amici herein support the position of the petitioners in this case, urging reversal of the decision by the United States Court of Appeals for the District of Columbia Circuit.

The interests of the amici are stated in the attached Motion (*supra*, pp. 1-5), and are not repeated herein.

ARGUMENT

THE NLRB'S CONSISTENT CONSTRUCTION OF SECTION 10(k) OF THE ACT TO INCLUDE THE EMPLOYER AS A NECESSARY PARTY TO A JURISDICTIONAL DISPUTE COMPORTS WITH THE CONGRESSIONAL INTENT, THE GENERAL POLICIES OF THE ACT, INDUSTRIAL REALITIES, AND THE CONTEMPORANEOUS CONSTRUCTION THAT INDUSTRY GAVE THAT PROVISION UPON ITS ENACTMENT. THE CONTRARY CONCLUSION BY THE COURT BELOW FAILS TO DISPEL THE REASONABLENESS OF THIS CONSTRUCTION AND THEREFORE MUST BE REVERSED.

I. Introduction And Summary.

The issue presented in this case concerns the proper construction of the statutory provisions of the National Labor Relations Act[1] involving the resolution of jurisdictional or work-assignment disputes. The court of appeals below, overturning the consistent interpretation given by the NLRB since these provisions were added to the statute in 1947, held that whenever the unions involved in a jurisdictional dispute have agreed among

[1] 29 U.S.C. 151, *et seq.*

themselves to resolve the dispute through some form of voluntary adjustment, their resolution of the dispute is controlling for statutory purposes even though the struck employer did not agree or consent to be bound by their resolution of the dispute; thus, under this circumstance, the NLRB is ousted of jurisdiction independently to determine the dispute, and NLRB regulation of further picketing or strikes concerning the dispute must be in accordance with the union's resolution.

The decision of the court below, and the issue presented in this case, turns on the determination of who comprises the "parties" to jurisdictional disputes within the meaning of Section 10(k). That section, and companion Section 8(b)(4)(D), are the jurisdictional dispute provisions of the Act, and must be read together for an understanding of the statutory scheme.

Section 8(b)(4)(D) makes it an unfair labor practice for a labor organization to strike or picket to force "any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . . ."[2]

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[2] Section 8(b)(4)(D) provides in full:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> * * * *
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to em-

Section 10(k) provides that whenever an 8(b)(4)(D) charge is filed, the NLRB is

> directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless . . . the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute . . . .

The NLRB has consistently held that the struck employer as well as the competing unions are "parties" to the jurisdictional dispute within the meaning of Section 10(k), and has required the employer to consent to any agreed upon method of voluntary adjustment, along with the unions involved, before it will divest itself of jurisdiction under the abstention provision of 10(k).[3] This consistent construction has been adhered to by the NLRB for more than twenty years, and had been accepted by every court of appeals which had adverted to it.[4] However, the court below rejected this interpretation, holding that it "is not the employer but the rival unions (or other employee groups) who are the parties to the juris-

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> ployees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

[3] *E.g., Los Angeles Bldg. & Constr. Trades Council (Westinghouse Electric Corp.)*, 83 NLRB 477, 482 (1949); *United Bhd. Carpenters, Local 581 (Ora Collard)*, 98 NLRB 346, 349 (1952); *International Union of Operating Engineers, Local 66 (Frank P. Badolato & Sons)*, 135 NLRB 1392, 1396 (1962); *Local 532, United Brotherhood of Carpenters (D. W. Winkelman Co.)*, 189 NLRB No. 94 (1971).

[4] *N.L.R.B.* v. *Local 825, Int'l Union of Op. Eng.*, 326 F.2d 213, 216 (3rd Cir. 1964); *Local 450, Int'l Union of Op. Eng.* v. *Elliott*, 256 F.2d 630, 635-636 (5th Cir. 1958); *N.L.R.B.* v. *Local 825, Int'l Union of Op. Eng.*, 410 F.2d 5, 9 (3rd Cir. 1969); *New Orleans Typographical Union No. 17* v. *N.L.R.B.*, 368 F.2d 755, 763 (5th Cir. 1966); *Quinn* v. *N.L.R.B.*, 61 LRRM 2690 (D.C. Cir. 1966).

dictional dispute contesting which employees are entitled to seek the work in question" (A. 371). Accordingly, the court held that the NLRB "may not properly proceed to determine a jurisdictional dispute pursuant to Section 10(k) when the disputing unions have agreed to settle their dispute . . . ." (A. 363).

The amici herein urge that the court's construction of the statutory provisions is plain error. The amici show below that the interpretation of the NLRB is consistent with the plain language of the statute and the intent of Congress, reflects industrial realities, and comports with the construction that industry—both employer and union groups alike—placed on the statute when it was enacted. Further, the amici show that, in consideration of all the circumstances here, the NLRB's consistent interpretation is entitled to great weight and should be upheld.

II. The Language Of The Statute Dictates The Conclusion That The Employer Is A Party To The Dispute Within Section 10(k)

The relationship of the pertinent statutory provisions, when read together, plainly shows that the employer as well as the competing employee groups are necessarily "parties" to a jurisdictional dispute within the meaning of Section 10(k). That section comes into play under the statutory language only after a union has struck, or has engaged in some other prohibited coercion, against an employer to force or require a different assignment of work, and the employer, or some other affected party, has filed an unfair labor practice charge under Section 8(b)(4)(D) of the Act. See *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 263-264 (1964).[5] Whenever this occurs, Section 10(k) requires the NLRB to "determine

[5] The employer was the charging party in 535 of 579 charges under Section 8(b)(4)(D) filed in fiscal year 1969. 34 NLRB Ann. Rep. 197 (1969).

the dispute out of which such unfair labor practice shall have arisen, unless . . . the parties to such dispute" have agreed on a method of adjustment.

The "parties to such dispute" obviously refers to the parties to the "dispute out of which such unfair labor practice shall have arisen"; and the employer is necessarily a party to that dispute because the unfair labor practice does not arise until the union takes coercive action against the employer to compel him to assign the work to its members.[6] Thus, the employer is made a party to the dispute by the very action which makes Sections 8(b)(4)(D) and 10(k) operative; the employer is therefore a "party" to the dispute within the meaning of Section 10(k).

III. Considerations Of Industrial Realities Compel The Conclusion That The Employer Be Recognized As A Necessary Party To The Dispute

Employers involved in jurisdictional disputes, particularly in the construction industry, are vitally concerned with the outcome of work assignment resolutions. "As a practical matter, few employers are totally unconcerned with what group of employees performs the various jobs involved in their business operations."[7] In many circumstances, the employer's economic interests are directly af-

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[6] Surely, the union would not take such action unless the employer would not comply with the union's request or the union feared that the employer would not. In either case, the union's coercive action shows that at that time it is involved in an active dispute with the employer.

[7] See Comment, *The Employer as a Necessary Party to Voluntary Settlement of Work Assignment Disputes Under Section 10(k) of the NLRA*, 38 U. Chi. L. Rev. 389, 399-400 (1971). There are situations, of course, where the employer is relatively indifferent as to which group of employees performs the work. *E.g., N.L.R.B.* v. *Radio & Television Broadcast Engineers Union (CBS)*, 364 U.S. 573 (1961), where the employer was willing to let either union involved perform lighting work or to divide up the work between the two unions. For the reasons discussed herein, however, such situations are rare.

fected by the determination as to which group is entitled to perform the assignment: indeed, in the construction industry, this determination is often a matter of economic life-or-death for the individual contractor.

In the construction industry, where most jurisdictional disputes occur,[8] a job is usually obtained through competitive bidding, oftentimes highly competitive bidding, and the profit margin for the contractor is narrow.[9] The contractor's bid is carefully based on factors relevant to the employees to whom he contemplates assigning the work —*i.e.*, their wage rates, their efficiency, their ability to perform the work at the desired quality level, the size of the crew required by the group, etc. The award of this work to another group of employees could result in considerably higher costs because of a change in any or all of these factors, and thereby not only eliminate the contractor's profit factor but also seriously jeopardize his financial condition.

Moreover, the award of the work to another group of employees could even lead to the contractor's losing the contract and to interference with stable labor relations. For example, if, as is often the case, the contractor has a collective bargaining agreement with a union covering particular work and he accordingly assigns the work to that union pursuant to the agreement, an award of the work to a stranger union would require the employer either to breach his collective bargaining agreement with the union, at perhaps the risk of a suit under Section 301 of the Act,[10] or else give up the contract. Or the increased

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[8] Approximately 66 percent of all 8(b)(4)(D) charges filed in the last fiscal year grew out of the construction industry. 34 NLRB Ann. Rep. 204-205 (1969).

[9] Comment, *The Employer as a Necessary Party to Voluntary Settlement of Work Assignment Disputes Under Section 10(k) of the NLRA*, 38 U. Chi. L. Rev. 389, 401 (1971).

[10] Section 301 (29 U.S.C. § 185) grants jurisdiction in any district court of the United States for suits "for violation of contracts between an employer and a labor organization".

costs of the stranger union alone may require the contractor to abandon the contract. Indeed, for these reasons, Martini Tile and Terrazzo Co., petitioner in this case, testified here that a change in its usual assignment of the work in dispute here from Tile Setters to Plasterers would deprive it of 30 percent of its annual business (A. 128).

Thus, a contractor's economic existence plainly is to a substantial degree affected by the resolution of work assignment disputes, and he is vitally interested in the outcome. Moreover, the employer's interest in factors of economy, efficiency, productivity, and the like, are consonant with the public's interest in these same factors. Accordingly, industrial realities dictate that any fair and reasonable machinery for the settling of jurisdictional disputes should take into consideration these factors. Indeed, the Second Circuit recently held as much, rejecting a contention that the NLRB in Section 10(k) determinations should adopt the standards used by the National Joint Board for the Settlement of Jurisdictional Disputes [11] in resolving such disputes. That court, finding that the Joint Board "gives little weight to considerations of economy and efficiency, and that past practice is usually held determinative",[12] affirmed the NLRB's

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[11] This body, as shown *infra* pp. 9-11, was set up by the Building Trades Department, AFL-CIO, after Section 10(k) was enacted, to resolve jurisdictional disputes in the construction industry.

[12] This was recently affirmed by one writer drawing from Joint Board Rules and Regulations. "In structuring its awards to best serve the interests of the constituent members of the Building Trades Department, the Joint Board gives controlling weight to prior Joint Board decisions of record and interunion agreements of record. In the absence of such decisions or agreements the award is determined by the established trade practice or the prevailing area practice." Comment, *supra* n. 9, 38 U. Chi. L. Rev. 389, 401-402 (1971); Note, 77 Yale L.J. 1191, 1200-1201 n. 52, 1203-1204 (1968); *K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION* 45 (1961).

consideration of these factors, as follows (*N.L.R.B.* v. *Local 25, I.B.E.W.*, 396 F.2d 591, 594 (1968)):

> It would be surprising, indeed, to find the Board, to which is entrusted the protection of the public interest in this area as in others, completely disregarding the factors of efficiency and economy in reaching its determination as to assignment of work. Nor is there any authority for such a startling proposition as that the national labor policy, which the Board is set up to further, requires that considerations of economy and efficiency in the employment of labor be ignored.

In view of the vital interest of the employer and the public in the resolution of these disputes upon consideration of these and other adequate factors, it seems most improbable that Congress would have intended to require the NLRB to defer under Section 10(k) to any dispute-settling machinery which failed to include the employer who made the assignnment. The factors of efficiency, economy, and productivity are peculiarly within the employer's knowledge;[13] therefore, the full participation of the employer in any dispute-settling process is essential to present the evidence relevant to these factors. Indeed, this Court has held that under the Railway Labor Act it is essential to bring all the parties, the railroad and the unions involved, together to participate in the proceeding to determine the jurisdictional dispute. *Transportation-Communication Employees Union* v. *Union Pacific Railroad Co.*, 385 U.S. 157 (1966). The Court found this essential to a fair hearing to settle such disputes, to which the "railroad, the employees, and the public, for all of whose benefit the Railway Labor Act was written, are entitled . . . ." 385 U.S. at 162.

Accordingly, considerations of industrial realities and the interests of the public compel the recognition of the employer as a party to any method of adjustment of disputes under Section 10(k) of the Act.

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[13] Attleson, *The NLRB and Jurisdictional Disputes*, 53 Geo. L. J. 93, 111 (1964).

IV. The Contemporaneous Construction Of The Statute By Construction Industry Groups Accords With The Recognition Of The Employer As A Party To The Dispute

Prior to the time Section 10(k) was added to the Act in 1947, construction unions affiliated with the Building and Construction Trades Department utilized an inter-union "Referee" system for the purpose of the resolution of jurisdictional dispute between the member unions. This system, which was put into effect in 1936, did not provide for employer participation in any form. Some earlier dispute-settling bodies in this industry had provided for employer participation, but these met with opposition because of the employer's participation and employers were excluded from participation as parties in the "Referee" system.[14]

Section 10(k) was enacted into law on June 23, 1947, as part of the Taft-Hartley Amendments. Almost immediately thereafter, on July 9, 1947, the Building Trades Department suspended the "Referee" system. Thereafter, the Building Trades Department resumed negotiations with employer groups in an effort to devise a workable plan which would conform to the requirements of the newly enacted Sections 10(k) and 8(b)(4)(D).[15] Assistance in these negotiations was given by NLRB General Counsel Robert Denham, who strongly encouraged, on behalf of the NLRB, that employers and unions establish "some joint procedure to which both the labor organizations

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[14] *K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION: THE CAUSES, THE JOINT BOARD, AND THE NLRB* 64-69 (1961).

[15] The Department had begun negotiations with employer groups prior to the passage of the Taft-Hartley Amendments "to find a workable way out of the difficulty." Report of President, Building Trades Department, 41st Annual Convention (Nov. 10, 1948), excerpted in Appendix 1(a) to amicus brief of Laborers' International Union.

and the members of the various employer associations would be firmly committed . . . ." [16]

On May 1, 1948, these negotiations resulted in the establishment of a Plan for National Joint Board for Settlement of Jurisdictional Disputes. This Plan was executed by employer groups, the Associated General Contractors ("AGC") and seven specialty contractors associations, and the Building and Construction Trades Department. The Plan called for the establishment of a Joint Board, with equal representation by employers and unions in addition to an impartial chairman. And the Plan expressly bound only those employers and unions who were stipulated to be bound by its determinations.[17]

Accordingly, the industry groups drafting the Joint Board Plan recognized that the employer was an indispensable party in the resolution of the jurisdictional dis-

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[16] Address by Robert Denham, Associated General Contractors Annual Convention, Feb. 11, 1948.

[17] See *STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION: THE CAUSES, THE JOINT BOARD, AND THE NLRB* 89-99 (1961). The Plan provided (Art. V, Sec. 5):

> It is understood only those *contractors* who employ members of the organizations affiliated with the Building and Construction Trades Department of the AFL-CIO, *shall be considered as bound* by this agreement *when they have signed a stipulation* setting forth that they are willing to subscribe to and be bound by the terms and provisions of this agreement. [Emphasis added].

The procedural rules of the Joint Board provide as follows (A. 343-344):

> These procedures shall apply to: (a) Contractors who employ members of the organizations affiliated with the Building and Construction Trades Department, AFL-CIO, and who have signed a stipulation setting forth that they are willing to be bound by the terms of the agreement establishing the Joint Board, or who are members of a signatory association of contractors with authority to bind its members, or who are parties to a collective bargaining agreement providing for the settlement of jurisdictional disputes under the procedures herein set forth . . . .

pute, and that in the absence of an employer stipulation to be bound to the Joint Board determination, the employer was free under Section 10(k) to take the case to the NLRB even though both unions were stipulated to the Joint Board. In fact, in briefs submitted to the NLRB after almost a decade of operation, the Joint Board acknowledged that employers are "parties" to jurisdictional disputes and that the NLRB must decide cases under 10(k) where the unions involved, but not the struck employer, are stipulated to the Joint Board.[18]

This contemporaneous construction of the statute by the various industry groups, unions and employers alike, and the National Joint Board itself, lends substantial support to the construction of the NLRB that the employer is a party to the dispute within the meaning of Section 10(k).

V. The NLRB's Construction Is Not Inconsistent With The Applicable Legislative History

The NLRB's construction of the statute to conclude that the employer is a "party" to a work-assignment dispute under Section 10(k) finds clear support in the legislative history of the relevant provisions of the Act. Although there is no direct discussion in the committee reports or the floor debates as to the precise meaning of the phrase "the parties to such dispute" as used in Section 10(k), the history behind the language used in Section 8(b)(4)(D) plainly shows that Congress considered the employer to be a party to such dispute.

There was no Section 10(k), or similar provision, in the House bill. That bill flatly prohibited all "jurisdictional strikes" against an employer and granted the employer the right to enforce this prohibition through an injunction and damage suit in federal district courts. The bill defined a jurisdictional strike as any concerted interference or strike which sought to force the employer to

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[18] See Brief for the National Joint Board at 27, 56-60, *Acoustical Contractors*, 119 NLRB 1345 (1957).

assign the work to one group of employees rather than another.[19]

Section 10(k) first appeared in the Senate bill in much the same form as it now appears in the act, but at that stage it also included a clause which authorized the NLRB to appoint an arbitrator to hear and determine those disputes leading to 8(b)(4)(D) charges. The Senate passed the bill with the arbitrator provision included in Section 10(k).[20] In Conference, the arbitrator clause was dropped and Section 10(k) took its present form, but without any discussion of the intended reach of the word "parties".[21]

Thus, the abstention provision of Section 10(k) and its reach was not discussed. As Judge MacKinnon aptly explained in his dissent in the instant case, the abstention provision of Section 10(k), and the scope of "parties" as used therein, "attracted no notice because it was always overshadowed by the provision for the Board to appoint an arbitrator." (A. 391). Accordingly, it is plain that, as Judge McKinnon further concluded in dissenting below (A. 392):

> The truth of the matter is that the legislative history of section 10(k) does not afford any substantial assistance to its interpretation and the weakness of the majority opinion is demonstrated by its assertion that it does.[22]

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[19] H.R. 3020, §§ 2(15) and 12(a), 80th Cong., 1st Sess., pp. 12, 47-50, in 1 Legislative History of the Labor Management Relations Act of 1947 [hereinafter cited as "LH"] 169, 204-207 (1947).

[20] H.R. 3020 as passed by the Senate, 80th Cong., 1st Sess., pp. 81-82, 100-101, in 1 LH 239-241, 258-259 (1947).

[21] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 57, in 1 LH 561 (1947).

[22] The majority below found support from the legislative history essentially on two points. First, the court referred to a statement by Senator Morse to the effect that Section 10(k) would encourage unions to set up machinery within their own ranks for the settle-

On the other hand, the legislative history of Section 8(b)(4)(D) plainly shows Congress' recognition of the employer as a party to the dispute. Section 8(b)(4)(D), as passed by the Senate, proscribed strikes against work assignments only where unions were involved;[23] but the Conference bill broadened this language to include strikes against work assignments to unrepresented employees as well.[24] Senator Taft explained that the purpose of this language was to protect employers from strikes and picketing by unions to force the employers to assign work to union members rather than to unrepresented employees for legitimate reasons.[25]

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ment of such controversies (A. 376-377). But in the speech quoted by the Court, Senator Morse specifically referred to the use of such machinery for "settling such disputes *short of economic action.*" (Emphasis supplied). 93 Cong. Rec. 1910-1911, in 2 LH 982-983 (1947). Senator Morse was plainly expressing the hope that the Act's proscriptions would encourage unions to resolve their differences prior to taking any strike action; his comments do not at all indicate that once strike action was taken the unions should settle the dispute among themselves without the employer's participation. In fact, the same "incentive" for unions to settle their disputes *short of economic action*, and therefore before the Act's machinery is operative, is equally present whether or not the employer is considered a party for purposes of Section 10(k).

Second, the court referred (A. 377-378) to a sentence in the House Conference Report describing 10(k) as authorizing the NLRB to determine "disputes between unions giving rise to unfair labor practices under Section 8(b)(4)(D) (jurisdictional strikes)." But this sentence may be just as easily read to support the NLRB view, for it plainly shows that 10(k) is not applicable until a strike implicating the employer has grown out of the dispute, and therefore, that three parties, the unions and the employer, are involved.

[23] That bill made it an unfair labor practice for a labor organization to strike to require the assignment of work to "members of a particular labor organization" rather than to "members of some other labor organization." H.R. 3020 as passed by the Senate, 80th Cong., 1st Sess., pp. 81-83, in 1 LH 239-241 (1947).

[24] The Conference bill was enacted into law proscribing strikes to force "an employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . . ."

[25] 93 Cong. Rec. 7000, in 2 LH 1624 (1947).

Thus, Congress plainly sought to subject to the Act's dispute-settling machinery work-assignment disputes between a union and an employer over the employer's assignment of particular work to its own unrepresented employees. In these circumstances, the dispute is clearly between the employer and the union. *Cf., Local 978, United Brotherhood of Carpenters* v. *Markwell*, 305 F.2d 38, 47 (8th Cir. 1962) (". . . it is clear that those sections are also applicable when the dispute might be said to be solely between an employer and a union"); *N.L.R.B.* v. *Local 25, I.B.E.W. (Sarrow-Suburban Elec. Co.)*, 383 F.2d 449, 454 (2nd Cir. 1967). And in this circumstance, the dispute being between the employer and the union, it is plain that Congress recognized the employer as one of the parties to the dispute for the purposes of Section 10(k).

Accordingly, since Congress has recognized the employer as a party for this purpose, and since there is no statutory language limiting the application of Section 10(k) to certain situations only, Congress apparently considered the employer one of the "parties to such disputes" for all purposes under Section 10(k).

VI. The NLRB's Consistent Administrative Construction For More Than Twenty Years Without Congressional Change Is Entitled to Great Weight And Should be Affirmed In The Absence, As Here, Of Compelling Reasons To The Contrary

A. *The NLRB Construction Of The Statute In The Circumstances Is Entitled To Great Weight*

As shown *supra* pp. 2-5, the NLRB construction of the statutory language in question here has been consistently adhered to by that agency for more than twenty years. From the time the issue was first directly presented to it, the NLRB has held that the abstention provision of Section 10(k) was not applicable unless the employer as well as the unions involved had agreed

upon a method of voluntary adjustment. *Los Angeles Building & Construction Trades Council (Westinghouse Elec. Corp.)*, 83 NLRB 477, 482 n. 7 (1949); *Int'l Hod Carriers Union, Local 231 (Middle States Tel. Co.)*, 91 NLRB 598, 604 (1950); *United Bhd. of Carpenters, Local 581 (Ora Collard)*, 98 NLRB 346, 349 (1952). It has consistently adhered to that construction ever since, *Local 532, United Bhd. of Carpenters (D.W. Winkelman Co.)*, 189 NLRB No. 94 (1971), without challenge by any court of appeals until the instant case.

In this circumstance, the NLRB construction of the statutory language is entitled to great weight. This Court has held on numerous occasions that a consistent interpretation of a statute by the agency charged with its administration is entitled to great weight. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), and cases cited therein. This is particularly true in circumstances as here, where the interpretation involves "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 549 (1940); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *accord*, *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965). Accordingly, the Court has held that a contemporaneous and consistent construction of the agency should not be overturned where it is a reasonable and admissible interpretation, even though there may be other reasonable interpretations of the language. *Udall* v. *Tallman*, *supra*, 380 U.S. at 18; *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921); *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583 (1930).

In addition, considerable weight should be attached to the fact that Congress has never changed the substantive or procedural provisions of the jurisdictional dispute provisions during the more than 20 years of the NLRB's

interpretation of that language, despite the fact that Congress enacted extensive revisions of the entire Act in 1959 and, in particular, rewrote most of the Section 8(b)(4) language. From this, "it is a fair assumption that by reenacting without pertinent modification the provisions with which we here deal, Congress accepted the construction placed thereon by the Board . . . ." *N.L.R.B.* v. *Gullet Gin Co.*, 340 U.S. 361, 366 (1951); *Zemel* v. *Rusk*, 381 U.S. 1, 11-12 (1965).[26]

For these reasons, the amici submit that the NLRB's construction of the statute here must be upheld. As shown in the preceding sections, the NLRB's construction is reasonably supported in the statutory language, history, and policies of the Act. Moreover, as we show below, the reasoning of the court below does not compel the conclusion that the NLRB interpretation is unreasonable.

B. *The Reasoning Of The Court Below Does Not Militate Against The NLRB's Construction Of The Statute*

In rejecting the NLRB's interpretation that the employer was necessarily a party to work-assignment disputes within the meaning of Section 10(k), the court below failed to comprehend the Congress' plain command

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[26] Contrary to the court below, this Court's decision in *Boys Markets, Inc.* v. *Retail Clerk's Union*, 398 U.S. 235 (1970), does not militate against attaching persuasive significance to Congress' reenactment of Sections 8(b)(4)(D) and 10(k) without change. The Court in *Boys Market* was concerned with *stare decisis*, and concluded that the "mere silence of Congress is not a sufficient reason for refusing to reconsider the [earlier] decision." Moreover, contrary to this case, there had been no relevant statutory revisions between the decisions of the Court. Where, as here, there has been a substantial re-enactment of related statutory provisions without changing the provision involving the questioned administrative interpretation, "Congress' failure to repeal or revise in the face of such administrative interpretation has been held to constitute persuasive evidence that the interpretation is the one intended by Congress." *Zemel* v. *Rusk*, 381 U.S. 1, 11-12 (1965).

and intent as discussed above. Instead, the court relied upon plainly erroneous grounds to justify its contrary conclusion.

1. The fundamental error by the court below was its assumption that the jurisdictional dispute provisions were enacted by Congress to protect only "the employer who was 'neutral' in the dispute"; and that an "employer has standing under these provisions when he is plagued by employee groups that do not agree, and not when he is dissatisfied with the way they do agree" (A. 383). The court further concluded in this regard: "The purpose of protecting the neutral employer is fully served by any binding settlement between the disputing employee groups. The neutral employer is one who cares not how the dispute is decided but wants merely that it be decided." (A. 375).

This conclusion is plain error. The literal language of the statute contains no requirement of employer neutrality and the court below made no contention that it does. Moreover, the NLRB specifically rejected the contention that Section 10(k) applied only where the employer was neutral and indifferent to the result in the first cases brought under Sections 8(b)(4)(D) and 10(k). *Lodge 68 of the Int'l Ass'n of Machinists (Moore Drydock Co.)*, 81 NLRB 1108, 1114 (1949); *Int'l Longshoremen's and Warehousemen's Union, Local 16 (Juneau Spruce Corp.)*, 82 NLRB 650 (1949). In *Juneau Spruce*, *supra*, 82 NLRB at 656, the NLRB held in rejecting the contention:

> [I]n the absence of language specifically limiting the application of Section 10(k) to certain situations only, or even persuasive legislative history in support of such restricted application, the Board is obliged to give effect to that Section which its language requires.

Further, any doubt as to whether these provisions apply where the employer is not neutral and indifferent

was surely dispelled by the change in the language of Section 8(b)(4)(D) in Conference to protect, subject to the Act's provisions, an employer's assignment to his own unrepresented employees (*supra*, pp. 13-14). Plainly, in that situation, Congress was not merely seeking to protect a neutral plagued by two unions who cannot agree, but was protecting, subject to a 10(k) determination, the employer's active interest in assigning work to a particular group of his own employees.

Finally, as shown above (pp. 5-8), as a matter of industrial reality the employer is seldom neutral and indifferent to the resolution of the dispute, but instead has a vital interest in the assignment of work to a particular group of employees. In the absence of dispositive legislative history to the contrary, it must be assumed that Congress recognized that reality and sought to give effect to the protection of that interest under the statutory scheme.[27]

2. The court below sought to supports its interpretation from the text of Section 10(k). The court's basic conclusion (A. 371) was that the words "the parties to such dispute" in 10(k) referred to the parties to the underlying dispute, which the court found to be the rival unions. However, this conclusion ignores the facts, as discussed above (pp. 13-14), that the underlying dispute in some cases, as Congress recognized, is between one union and the employer, and that the "dispute out of which such unfair labor practice shall have arisen" (the statutory language) is the dispute which causes a union to strike because the employer failed to acquiesce in the union's request for the assignment to its members.

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[27] See Comment, *supra* n. 7, 38 U. Chi. L. Rev. 389, 397-398 (1971), where the court's neutrality requirement, after examination in detail, was found wanting. The author concluded: "The lack of significant legislative or executive comment on the neutrality issue makes it difficult to escape the conclusion that the problem was never really considered in the 10(k) context."

In addition, the court argued (A. 371) from the statutory language that Congress could easily have made the employer a party, if that had been its intent, by express language. But this argument carries no persuasive impact for the court's view: Congress could also have written Section 10(k) so as to limit the necessary parties specifically to the rival labor groups involved, but it failed to do so. The failure of Congress to make its intent clear by express language provides no proof of intent either way.

Also, the court found "persuasive evidence" for its interpretation in the fact that the employer is not bound under the Act to follow a 10(k) determination (A. 371). But the scheme of the Act does not bind any of the parties to a 10(k) determination. A union which exerts strike pressure in the face of an adverse 10(k) determination can have the 10(k) award applied against it only through an order under Section 8(b)(4)(D), which would require that the picketing cease and desist. But the same economic sanction is available against the employer where he chooses to ignore a 10(k) determination, for there the union receiving the favorable award can freely strike or picket that employer without violating Section 8(b)(4)(D). See *Local 502, Int'l Hod Carriers (Cement-Work, Inc.)*, 140 NLRB 694 (1963). Accordingly, the employer is bound in a very meaningful sense.

3. The court below also found support for its position in the NLRB's *Safeway* doctrine (A. 383-384). In *Safeway* and similar cases,[28] the NLRB has dismissed a 10(k) proceeding upon finding that one of the unions has renounced any claim to the work in question. This practice does not indicate that the NLRB has accepted a voluntary adjustment by the unions, but rather indicates that a necessary requisite of a jurisdictional dispute—

[28] *Teamsters Local 107 (Safeway Stores, Inc.)*, 134 NLRB 1320 (1961); *Local 1905, Carpet Linoleum Layers (Butcher and Sweeney Constr. Co.)*, 143 NLRB 251 (1963).

the existence of conflicting claims to the work—is absent. Under this doctrine the NLRB does not bind the employer to assign the work to the non-renouncing union; the employer may well assign the work to a third group of employees.

Thus, the NLRB's *Safeway* doctrine does not lend support to the court's view that the employer is not a necessary party to a jurisdictional dispute within Section 10(k). The NLRB has applied this doctrine to determine whether in fact a jurisdictional dispute exists, *i.e.*, whether there is a real dispute;[29] it provides no support for determining whether the employer should be a party to the resolution once a real dispute is found to exist.

4. Nor is the court's position aided by its reliance upon "the general principle that full scope should be given to voluntary arbitration procedures" (A. 381). The question here is not whether arbitration is desirable, but who should be a party to the arbitration. Plainly, arbitration is not desirable where it would have a direct effect on the interests of a person not a party to the arbitration. See *Retail Clerks Local 770* v. *Thrifty Mart*, 59 Cal. 2d 421, 423-424, 380 P.2d 652, 655-656 (1963) (holding, per J. Traynor, that there can be no "valid arbitration award in the absence of a party directly affected by the award"); *Retail Clerks Local 428* v. *L. Bloom & Sons*, 173 Cal. App. 2d 701, 703, 344 P.2d 51, 52-53 (1959).

Moreover, the NLRB's interpretation does give full scope to voluntary arbitration within the meaning of this Court's decision in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261 (1964). The NLRB position in no way pre-

[29] The NLRB and the courts have applied the *Safeway* doctrine narrowly. Explicit disclaimers have been held non-dispositive in circumstances which inferentially belie the disclaimer. *See Local 1291, ILA*, 152 NLRB 676 (1965), *enforced*, 368 F.2d 107 (3rd Cir. 1966) (disclaiming union had a contract with the employer covering the work); *Plumbers Local 525*, 173 NLRB No. 208 (1968) (disclaiming employees continue to do the work).

cludes the unions involved from attempting to resolve the dispute through binding arbitration procedures such as the National Joint Board. And indeed, resort to such arbitration may well resolve the dispute even though the employer is not included in the arbitration procedure or bound to the result.[30] But even if the arbitration procedure does not resolve the dispute, *Carey* recognizes that the policy favoring arbitration does not preclude the NLRB from determining the issue. 375 U.S. at 272.

5. Finally, the weakness of the court's analysis is shown by its hedging acknowledgment that its position might not apply in a situation where the voluntary adjustment proceeding failed to make "realistic provision for meaningful attention to the interest of the employer, and to questions of efficiency". (A. 384-385 and n. 27). This statement is wholly inconsistent with the court's positive assertions throughout its opinion that Congress' *intent* in 10(k) was to protect the neutral employer from the quarreling unions and that this was "fully served by any binding settlement between the disputing employee groups." (A. 375).

In any event, there is serious question as to the accuracy of the court's conclusion that the National Joint Board does make "realistic provision for meaningful attention to the interests of the employer and to questions of efficiency" and is therefore the kind of "private-ordering mechanism for the resolution of jurisdictional disputes" permissible under its view of the Act to require the NLRB to abstain from asserting jurisdiction under 10(k). The Second Circuit has found to the contrary that the "Joint Board gives little weight to considerations of economy and efficiency, and that past practice is usually held determinative." *N.L.R.B.* v. *Local 25, I.B.E.W.*,

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[30] For example, the employer may recognize the wisdom of the arbitral determination and abide by it. Or, the determination may be against the striking union and the union relinquishes its claim for the work.

396 F.2d 591, 594 (1968). Commentators have made the same point. See *K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION* 45 (1961); Comment, *supra* n. 9, 38 U. Chi. L. Rev. 389, 401 (1971) (". . . its decisions tend to reflect purely union interests."); Note, *The NLRB and Deference to Arbitration*, 77 Yale L.J. 1191, 1200-1201 n. 52 (1968).

Thus, Joint Board determinations are often made by reliance upon ancient and outmoded inter-union agreements and decisions of record, some dating back to early 1900's. Indeed, in this case, the Joint Board award was made in reliance upon a 1917 agreement between the International Unions involved and a 1924 decision interpreting the agreement (A. 316, 341-342), although the dispute involved a method of applying tile which was developed in recent years (A. 18-19, 110, 363).

As a result of this practice and the failure to heed essential managerial considerations, many employer groups, including the Associated General Contractors which had a primary responsibility in negotiating the first Joint Board,[31] have now withdrawn from the Joint Board Plan. None of the associations participating in this amicus brief are stipulated to the current Joint Board.

Thus, the court plainly erred in concluding that the Joint Board meaningfully takes into account managerial factors of economy and efficiency. This error is of sig-

[31] The AGC and seven specialty contractor associations were the first employer groups stipulated to the Joint Board procedures. This Joint Board Plan terminated in 1969 when the AGC and four specialty contractor associations were unable, after lengthy negotiations, to secure certain reforms in the existing plan. The AGC later refused to become signatories to a new Joint Board Plan which went into effect on April 3, 1970. Other specialty contractor associations including International Association of Wall and Ceiling Contractors, Mason Contractors Association, and National Roofing Contractors Association, amici here, withdrew years earlier, as did the Tile Contractors Association, petitioner in No. 1231.

nificant importance, for it emphasizes what the court itself plainly indicated (A. 384-385), *i.e.*, that there is doubt as to whether its analysis should apply in the face of a voluntary adjustment procedure that is "subject to an infirmity that undercut its fairness and reliability . . ." (A. 384). This admission of doubt itself undermines the court's entire analysis, for neither the language of the Act nor its legislative history indicates that the work-assignment dispute provisions should be interpreted differently as differing circumstances appear. Moreover, the error highlights the plain fact that an employer has a direct interest in the resolution of work assignment disputes upon consideration of relevant managerial factors, and any controlling resolution of that dispute without his participation is subject to the infirmity of fundamental unfairness. See *Retail Clerks Local 770* v. *Thrifty Mart*, 59 Cal. 2d 421, 423-424, 380 P.2d 652, 655-656 (1963). Accordingly, the NLRB's construction of the Act to require the employer to be bound to any voluntary adjustment of the dispute under the abstention provision of 10 (k) is plainly preferrable to the court's analysis in that it provides substantive protection for all parties in interest involved in the dispute, and thereby comports with the requirements of fundamental fairness.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

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SUPREME COURT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 1231 and 1184

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC.,

Petitioners,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS TEXAS STATE TILE, ET AL.

OPINIONS BELOW

The opinion of the court of appeals (A. 361-397) is reported at —— F.2d ——. The Decision and Order (A.

3-13) of the National Labor Relations Board ("Board" herein) is reported at 172 NLRB No. 77. The underlying Decision and Determination of Dispute (A. 13-25) of the Board is reported at 167 NLRB 185.

JURISDICTION

The judgment of the court of appeals (A. 398-399) was entered on June 30, 1970. On October 1, 1970, the court of appeals denied timely petitions for rehearing *en banc* filed by petitioners here and the Board (A. 400-401). The petition for a writ of certiorari was timely filed on January 13, 1971 (after an extension was granted by Chief Justice Burger), and certiorari was granted on March 22, 1971 (A. 402). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. 160(e)).

QUESTION PRESENTED

Whether, under Section 10(k) of the National Labor Relations Act, after a union has taken coercive action to protest an employers' assignment of work to one group of employees rather than another, the Board is divested of power to determine the underlying jurisdictional dispute whenever the competing unions have agreed among themselves to be bound by a voluntary method for the adjustment of the dispute although the employer has not consented to be bound by that adjustment.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix A, *infra*, pp. 47-49.

STATEMENT

This case involves picketing by the Plasterers Union ("Plasterers"),[1] against two employers at separate and unrelated construction sites in order to obtain for its members work which the employers had assigned to their own employees, who were members of the Tile Setters Union ("Tile Setters").[2] In both instances, the employers were currently recognizing the Tile Setters as the collective bargaining representative of their employees and had for several years entered into collective bargaining agreements with that union (A. 15, 16-17; 28, 55, 59, 355). Neither employer had a collective bargaining agreement with the Plasterers (A. 20).

A. The Dispute Over Contractor Texas State's Assignment

In 1965, the University of Houston contracted with Southwestern Construction Company ("Southwestern") to construct an addition to the University's Anderson Library. Southwestern then subcontracted the tile and terrazzo work involved on this job to petitioner Texas State Tile and Terrazzo Company ("Texas State") (A. 15; 45-46, 27-28, 36). This work consisted of the application of tile to the walls of the restrooms and to the stairwalls of the eight-story library building. The tile was applied directly to a second coat of Portland cement mortar after a thin scratch coat of cement had been applied to the metal lath by employees represented by the Plasterers (A. 16; 29-30, 36-38, 47-48, 150-152). Texas State, pursuant to its collective bargaining agreement with the Tile Setters, assigned the application of the second coat and the tile to its employees, who were represented by the Tile Setters (A. 15; 40, 45-46, 59-60).

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[1] Plasterers' Local Union No. 79, Operative Plasterers' and Cement Masons' International Association, AFL-CIO.

[2] Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America.

Representatives of the Plasterers protested to the Tile Setters that the application of the second coat was Plasterers' work (A. 15; 47, 49-50, 52).[3] When the Tile Setters disagreed with this claim, the Plasterers submitted the matter to the National Joint Board for the Settlement of Jurisdictional Disputes ("Joint Board"), a body set up by the Building Trades Department of the AFL-CIO to settle jurisdictional disputes (A. 15; 53). Both the Plasterers and the Tile Setters were bound, as a result of their affiliation with International Unions who are constituents of the AFL-CIO Building Trades Department, to submit jurisdictional disputes to the Joint Board. Texas State was not a signatory to and was not bound in any way to the Joint Board, and neither were its bargaining representatives, the Tile Contractors Association of America or the local chapter of the Tile Contractors (A. 15-16; 46-47). Texas State informed the Joint Board of this fact and stated that it desired to present the dispute instead to the Board (A. 325).

On November 10, 1966, the Joint Board, relying upon precedent of August 22, 1917, ruled that the work in dispute should be assigned to Plasterers (A. 15-16; 327-328). The Joint Board specifically limited its award solely to the particular project (A. 327-328).

After the Joint Board award, the Plasterers sought to obtain the work in question, but Texas State and its employees refused to accede to their demands (A. 6, 16; 52). On January 24, 1967, the Plasterers picketed at the project to protest Texas State's refusal to assign the work to its members, and all crafts working on the job honored the picket line, causing a complete work stoppage (A. 6-7, 16; 31-32, 46). On February 10, 1967, the United States District Court for the Southern District of Texas, upon the application of the NLRB Regional Di-

[3] The second coat is termed the "brown coat" by Plasterers, and is called either the "float coat" or "setting bed" by the Tile Setters (A. 16; 49-50).

rector, enjoined the picketing pursuant to Section 10(l),[4] of the Act. (A. 7, 16; 26-27).

B. The Dispute Over Contractor Martini's Assignment

In 1967, Rainbo Baking Company of Houston, Texas, decided to remodel the panning room of its bakery. It contracted directly with petitioner Martini Tile and Terrazzo Company ("Martini") to install ceramic tile over a brick wall in the baking area of the bakery (A. 16-17; 55, 97-98). The job required nailing metal lath over the brick, applying a coat of Portland cement mortar directly to the lath, and setting the tile onto the cement mortar (A. 17; 56-57, 97-98, 107-108). Martini, pursuant to its collective bargaining agreement with the Tile Setters, assigned this work to its own employees who were represented by the Tile Setters (A. 16-17; 55, 355).

Martini began working at the project site on March 15, 1967. On March 17, the Plasterers picketed the site in order to force Martini to assign the work involving the application of the cement mortar to Plasterers rather than Tile Setters (A. 7, 17; 55-56, 356). During the picketing, other crafts refused to work, and Rainbo officials requested Martini to remove its employees from the premises (A. 7-8, 17; 356, 58, 97). Martini complied with the request and the picketing stopped (A. 7-8, 17; 97). Martini subsequently returned to the project and completed the job (A. 8, 17; 56).

Although both the Plasterers and the Tile Setters were subject to the Joint Board procedures, the Plasterers did not submit this dispute to the settlement procedures of that body. Martini was not stipulated to or bound by the Joint Board procedures on its own or through any of the associations to which it belonged (A. 55).

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[4] 29 U.S.C. 160(1). See Appendix A, *infra*.

C. The Proceedings Before The Board

On January 30, 1967, and February 7, 1967, Southwestern and Martini filed separate unfair labor practice charges against the Plasterers with the Board, contending that the Plasterers' picketing in each instance had violated Section 8(b)(4)(D)[5] of the Act. After investigation of the charges disclosed reasonable cause to believe a violation had occurred, the Board, pursuant to Section 10(k)[6] of the Act, issued a notice of hearing to determine the dispute out of which the alleged violation arose. At the hearing in April 1967, Texas State intervened in the consolidated proceedings and participated in the hearing with the charging parties and competing unions (A. 3-4, 14). On August 22, 1967, the Board issued its Decision and Determination of Disputes.

1. *The Determination of the Jurisdictional Dispute*— In determining the merits of the underlying jurisdictional disputes, the Board rejected the Plasterers' contention that it had no jurisdiction to determine the particular disputes. The Plasterers argued that Section 10(k) divested the Board of jurisdiction over a jurisdictional dispute where "the parties to such dispute" had agreed upon a method of voluntary settlement, and that "the parties" here had agreed upon a method for voluntary settlement since both unions were bound to submit the dispute to the Joint Board. The Board found this

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[5] Section 8(b)(4)(D) is the "jurisdictional dispute" unfair labor practice provision of the Act. In general, it proscribes union picketing or coercion of an employer designed to force or require the employer to assign work to members of one union rather than to members of another union. For the full text of that section, see Appendix A, *infra*.

[6] Section 10(k) directs the Board to determine the merits of the underlying jurisdictional dispute whenever it is charged that Section 8(b)(4)(D) has been violated, *unless* "the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. See Appendix A, *infra*.

contention to be without merit, holding that it had consistently ruled that "the employer who assigned the disputed work must be a party to an agreement that purports to settle an existing jurisdictional dispute" before the Board is divested of jurisdiction under Section 10(k) and that neither of the employers involved here had agreed to be subject to or bound by the Joint Board. Accordingly, the Board concluded that all "the parties" to the dispute had not agreed upon a method for the adjustment of the dispute, and therefore, that the Board had jurisdiction under Section 10(k) (A. 19 n. 3).

On the merits of the dispute, the Board weighed all the relevant factors, including the award of the Joint Board, and concluded that at both projects employees represented by the Tile Setters, rather than those represented by Plasterers, were entitled to perform the work of applying the coat of Portland cement mortar upon which tile was to be installed (A. 20-23).[7] Accordingly, the Board determined that the Plasterers were not entitled to picket or otherwise coerce the employers to assign the work in dispute to its members. The Board directed the Plasterers to notify the Regional Director of the Board within ten days as to whether it would comply with the determination (A. 23-24).

2. *The Unfair Labor Practice Proceeding*—The Plasterers declined to comply with the Board Decision and Determination of Disputes. The Board's General Counsel, pursuant to the applicable Rules and Regulations, thereafter issued a complaint upon the outstanding 8(b)

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[7] The factors considered by the Board included the applicable collective bargaining agreements, the relative skills of the various employee groups, the efficiency of the operation under the respective employee groups, the agreements between the Plasterers and Tile Setters, the industry practice, the employer and area practice, and the Joint Board award (A. 20-23). The Board did not attach controlling weight to the Joint Board award in "view of all the circumstances, including its ambiguous nature, and upon the entire record." (A. 22).

(4)(D) charges (A. 4). The parties waived a hearing on the complaint and submitted the case directly to the Board upon a stipulation and the record in the 10(k) proceeding (A. 4; 355-357).

Upon the entire record, the Board found that the Plasterers had violated Section 8(b)(4)(D) of the Act by picketing the Anderson Library and Rainbo Bakery sites for the objects of forcing Texas State and Martini to assign the disputed work to employees represented by Plasterers rather than to employees represented by Tile Setters. The Board again rejected the Plasterers' contention that Section 10(k) precluded the Board from determining the dispute, reiterating its

> consistent interpretation of Section 10(k) that the employer controlling the work assignment as well as the rival unions involved comprise the "parties to such dispute", and all must approve and enter into a voluntary adjustment procedure in order to preclude a hearing and determination pursuant to that Section [A. 8].

The Board issued its usual order, requiring the Plasterers to cease and desist from the unfair labor practices found and to post the appropriate notices (A. 10-12).

D. The Decision of the Court of Appeals

The court of appeals (Judges Leventhal and McGowan for the majority, with Judge MacKinnon dissenting) set aside and denied enforcement of the Board order (A. 361-397). In the court's view "the Board erred in claiming authority under § 10(k) of the Act to determine the merits of a jurisdictional dispute between two unions when the unions had agreed on a method for binding arbitration of their disputes" (A. 370). According to the court, Section 10(k) requires the Board to abstain from determining jurisdictional disputes whenever "the parties to such dispute" have agreed on a method for the adjustment of such dispute, and that the proper con-

struction of that provision should be that it "is not the employer but the rival unions (or other employee groups) who are the parties to the jurisdictional dispute contesting which employees are entitled to seek the work in question" (A. 371). Since all the unions involved were bound to the adjustment procedure of the Joint Board, the court held that the "parties" to the dispute had agreed on a method for the adjustment of the dispute and that the Board could not properly proceed under Section 10(k) (A. 370, 384-385).

In a dissenting opinion, Judge MacKinnon disagreed with the conclusion that the employer was not one of "the parties to such dispute." Relying upon *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 263-264 (1964), he pointed out that under Section 8(b)(4)(D), and therefore 10(k), there is no "dispute" within the contemplation of the Act until one of the unions has made the employer a party to the dispute by striking him or engaging in other coercive action as a result of the employer's assignment of work (A. 393-394). Finding no validity to the court's assertion of support for its position in the legislative history and case law, Judge MacKinnon found the "majority opinion . . . to be an unreasonable interpretation of the Act" (A. 396).

SUMMARY OF ARGUMENT

I

Since the jurisdictional dispute provisions were added to the Act by the Taft-Hartley Amendments in 1947, the Board has consistently interpreted Section 10(k) as including the employer as one of the "parties" to a dispute over his assignment of work. Thus, the Board has consistently construed the abstention provision in 10(k), which requires the Board to abstain from deciding a jurisdictional dispute where "the parties to such dispute" have agreed upon a voluntary method of adjustment, as

requiring the consent of both the employer and the unions involved before the provision applies. Otherwise, the Board exercises its usual jurisdiction and determines the merits of the dispute after a 10(k) hearing.

The Board's construction of Section 10(k) in this regard had been accepted without challenge in the courts of appeals for more than 20 years until the decision of the court below, which held that the "parties" to a jurisdictional dispute included only the rival unions and that the Board was therefore deprived of power to determine the dispute whenever the unions involved had agreed upon a method of adjustment of the dispute. Under settled law, the construction of the statute by the Board was entitled to affirmance. This Court has plainly held that the consistent construction of a statute by an administrative agency, particularly where it is a contemporaneous construction by the men charged with setting the statute's machinery in motion, should not be overturned where the construction is a reasonable construction of the statute. *Udall* v. *Tallman*, 380 U.S. 1, 4, 16-18 (1965); *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921); *Universal Battery Company* v. *United States*, 281 U.S. 580, 583 (1930).

II

1. The Board's construction is a reasonable interpretation of the statutory language. Section 10(k) must be read with companion Section 8(b)(4)(D), which proscribes strikes and other coercive pressure against an employer to force the employer to assign particular work to particular employees. By its terms, 10(k) is not operative until a strike or other coercive acts has occurred and has resulted in the filing of a charge under Section 8(b)(4)(D). *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 263-264 (1964). Thus, Section 10(k) is not operative until one of the disputing unions has made the employer a party to the dispute by striking, etc., to compel the result it desires. It is therefore a reasonable con-

struction of the statutory language to conclude that the phrase "parties to such dispute" encompasses the employer, whose work assignment is challenged, as well as the unions involved.

In addition, the language of Section 8(b)(4)(D) and its legislative history shows Congress' recognition that some jurisdictional disputes within the Act's proscription actually involve disputes directly between a union and the employer over the employer's assignment. *See Local 978, United Brotherhood of Carpenters* v. *Markwell*, 305 F.2d 38, 47 (8th Cir. 1962); *National Labor Relations Board* v. *Local 25, I.B.E.W. (Sarrow-Suburban Elec. Co.)*, 383 F.2d 449, 454 (2nd Cir. 1967). For Congress recognized, and so expressed in 8(b)(4)(D), that an employer's assignment to his own unrepresented employees was entitled to the same statutory protections and dispute-settling procedures as an assignment to a labor organization. Clearly, a union's strike in protest of such an assignment manifests a dispute between the union and the employer. Thus, Congress plainly recognized the employer as one of the "parties to such dispute" within the meaning of 10(k).

2. Although the legislative history does not reflect any discussion of the precise meaning of the word "parties" in 10(k), it does provide support in general for the Board's construction. Section 10(k) in the bill which passed the Senate was practically identical to that section as enacted, except it provided authority for the Board to appoint arbitrators to determine the merits of jurisdictional disputes under 10(k). In conference, the arbitration provision was deleted, and Congress "decided to entrust this decision to the Board." *National Labor Relations Board* v. *Radio & Television Broadcast Engineers Union, Local 1212, I.B.E.W. (CBS)*, 364 U.S. 573, 583 (1961). This change plainly reflects Congress' desire to place the public's interest in the determination of jurisdictional disputes in the hands of the Board rather

than private arbitrators. It would be inimical to this purpose to conclude that Congress at the same time intended to oust the Board of jurisdiction under 10(k) and place the determination of jurisdictional disputes in the hands of an inter-union arbitration procedure whenever the unions involved agreed to do so. It is more consonant with the Congressional purpose to conclude that Congress intended 10(k)'s abstention provision to apply only when the struck employer and the unions involved agreed to voluntary arbitration, for in that situation the interests of the public can better be protected through the presence and participation of all the parties interested in the resolution of the dispute.

3. The Board's construction of the statute reflects its recognition of the economic reality that an employer has a direct and substantial substantive interest in his assignment of work to particular groups and in the outcome of disputes challenging this assignment. The Board's construction, contrary to that of the court below, recognizes that fundamental fairness requires, in light of this employer interest, that when the employer's assignment is challenged by means proscribed by the Act, any voluntary method for determining the dispute over the work assignment must provide for the right of the employer meaningfully to participate in all phases of that dispute-settling process.

The Board's construction in this regard comports with the consensual basis of arbitration under national labor policy, and it also comports with essential requirements under the Railway Labor Act for determining jurisdictional disputes.

III

The contrary decision of the court below rests primarily on the premise that the employer is necessarily a neutral party in jurisdictional dispute controversies. However, this conclusion is contrary to economic realities

and the language of Section 8(b)(4)(D), in which Congress acknowledged the intention to provide statutory protections to jurisdictional dispute controversies where the employer was actively interested rather than neutral. The court's reliance upon dictum from this Court's opinion in *CBS*, *supra*, 364 U.S. 573 (1961), and on various items of legislative history, does not establish that Congress recognized, contrary to the plain economic realities, that the employer was a neutral party who cared not how the dispute was decided.

The court's analysis fails to dispel the reasonableness of the Board's construction of the statute, and therefore the Board's construction must be upheld.

ARGUMENT

I. Introduction And Background: The Issue Defined

A. *Introduction: Background of the Board's Construction*

The instant case presents an important question of statutory construction involving the jurisdictional dispute provisions of the Act. The court of appeals below, rejecting the settled construction consistently adhered to ever since the enactment of these provisions more than 20 years ago, held that the Board has no authority to determine a jurisdictional dispute where the competing unions involved have agreed upon a binding method for the adjustment of the dispute.

The jurisdictional dispute provisions were added to the Act by the Taft-Hartley Act of 1947. Section 8(b)(4)(D)[8] makes it an unfair labor practice for a union to

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[8] Section 8(b)(4)(D) provides in full:

It shall be an unfair labor practice for a labor organization or its agents—

* * * *

[Footnote continued on page 14]

picket or otherwise coerce an employer for the object of forcing the employer to assign work to one union or group of employees rather than to another. Under the scheme of the Act, however, whenever a charge alleging a violation of Section 8(b)(4)(D) is filed, Section 10(k) *directs* the Board, before proceeding with a complaint under 8(b)(4)(D), to

> hear and determine the dispute out of which such unfair labor practice shall have arisen, unless . . . the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute.

In the very first cases brought under the jurisdictional dispute provisions, the Board was forced to determine the relationship of the two sections. In *Lodge 68 of the International Association of Machinists (Moore Drydock Company)*, 81 NLRB 1108 (1949) and *International Longshoremen's and Warehousemen's Union, Local 16 (Juneau Spruce Corp.)*, 82 NLRB 650 (1949), the Board held the two sections must be read together for a proper interpretation of their meaning. In these cases, the

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[8] [Continued]

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order of certification of the Board determining the bargaining representative for employees performing such work: * * *

Board rejected the argument that Section 10(k) was applicable only in the limited circumstance where the employer involved in the dispute was neutral and indifferent to the outcome of the dispute, holding instead that Section 10(k) was applicable in all charges of an 8(b)(4)(D) violation.[9] The Board found the statute left it no discretion as to when to invoke 10(k), but plainly "directed" it to invoke that section "whenever" an 8(b)(4)(D) violation was charged. *Moore Drydock, supra*, 81 NLRB at 1114. Accordingly, it held (*Juneau Spruce, supra*, 82 NLRB at 656):

> [I]n the absence of language specifically limiting the application of Section 10(k) to certain situations *only*, or even persuasive legislative history in support of such restricted application, the Board is obliged to give effect to that Section which its language requires.

Moreover, the Board concluded that the statutory language and the legislative history showed that in enacting Section 10(k) Congress found it desirable to give the Board an opportunity to resolve the underlying jurisdictional dispute before proceeding with an unfair labor practice complaint, and that there was no legislative indication of a purpose to have this aim fulfilled in less than all 8(b)(4)(D) charges. *Juneau Spruce, supra*, 82 NLRB at 656. In conjunction with this purpose, the Board noted that in the final bill, as passed, Congress eliminated a provision in the Senate bill which would have permitted the Board to appoint an arbitrator to

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[9] In *Moore Drydock*, a dissenting Board member argued that Sections 8(b)(4)(D) and 10(k) were not coterminous, and that 10(k) was applicable only where the employer was neutral and indifferent as to which of the labor organizations should be entitled to perform the work. Absent that circumstance, the dissent argued the Board should proceed directly with an 8(b)(4)(D) hearing. 81 NLRB at 1128. In *Juneau Spruce*, the Board rejected the same argument presented by the employer involved who had a direct interest in having one union perform the work in question. 82 NLRB at 655.

resolve the dispute under 10(k), and instead placed that responsibility entirely on the Board. *Id.* at 656.[10] Implicit in its decision was the realization that Congress preferred that the Board, as the agency established to vindicate the public interest in labor-management relations, have the primary responsibility, rather than private arbitrators, for resolving jurisdictional disputes.

Of course, neither of these first cases raised directly the issue concerning the scope of the abstention provision of Section 10(k). Shortly thereafter, however, the issue was specifically presented in several cases where the unions involved in disputes contended that they had agreed upon a voluntary method of adjustment, and that therefore the Board was ousted of jurisdiction under the abstention provision of Section 10(k). But in these cases the Board, consistent with its role as the primary agency established by Congress for resolving jurisdictional disputes, declined to abstain from asserting its jurisdiction in the absence of an agreement between the unions *and* the employer for a binding method of adjustment. See *Los Angeles Building & Construction Trades Council (Westinghouse Electric Corp.)*, 83 NLRB 477, 482 n. 7 (1949); *International Hod Carriers, Local 231 (Middle States Tel. Co.)*, 91 NLRB 598, 604 (1950). In subsequent cases, the Board couched its determination of the issue in statutory terms, referring to the employer as one of the "parties" to the underlying jurisdictional dispute within the meaning of Section 10(k), and held that it was divested of jurisdiction under that section only where all the "parties" have "submitted to us satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute." *Inter-*

[10] The legislative history on this point is summarized in *N.L.R.B. v. Radio and Television Broadcast Engineers Union, Local 1212, I.B.E.W. (CBS)*, 364 U.S. 573, 581-582 (1961), where this Court found that the effect of eliminating the Senate provision "was simply to place the responsibility for compulsory determination of the dispute entirely on the Board."

national Union of Operating Engineers, Local 66 (Frank P. Badolato & Sons), 135 NLRB 1392, 1396 (1962).[11] The Board has, as in the instant case and subsequent cases,[12] consistently adhered to this interpretation of Section 10(k).

The Board's consistent construction of the statute for more than twenty years had, prior to the instant case, never been challenged by any court of appeals. Indeed, the Board's interpretation has been favorably relied upon by those courts reviewing determinations in jurisdictional dispute cases. See *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 326 F.2d 213, 216 (3rd Cir. 1964); *Local 450, Int'l Union of Operating Engineers* v. *Elliott*, 256 F.2d 630, 635-636 (5th Cir. 1958; *Quinn* v. *National Labor Relations Board*, 61 LRRM 2690 (D.C. Cir. 1966) (unreported officially); *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 410 F.2d 5, 9 (3rd Cir. 1969) (citing the Board decision in the instant case for the proposition that the Board need hold a 10(k) hearing only where all parties are not bound to a method for

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[11] Accord: *United Brotherhood of Carpenters, Local 581 (Ora Collard)*, 98 NLRB 346, 349 (1952); *Local 17, International Union of Operating Engineers (Empire State)*, 99 NLRB 1481, 1485 (1952); *United Association of Journeymen & Apprentices, Local 428*, 108 NLRB 186, 197 (1954); *United Association of Journeymen & Apprentices, Local 420 (Frank W. Hoke)*, 109 NLRB 854, 857 (1954); *Local 450, International Union of Operating Engineers (Sline Industrial Painters)*, 119 NLRB 1725, 1731-1732 (1958); *Local 173, Wood, Wire & Metal Lathers (Newark & Essex Plastering Co.)*, 121 NLRB 1094, 1103 (1958); *Newspaper & Mail Deliverers' Union (News Syndicate Co., Inc.)*, 141 NLRB 578, 580 (1963); *Bricklayers & Masons International Union, Local No. 3 (Engineered Building Specialties, Inc.)*, 144 NLRB 1279, 1282 (1963); *Latherers Local 62 (Belou & Co.)*, 150 NLRB 21, 25 (1964).

[12] See *Lathers Union Local 104, Wood, Wire and Metal Lathers International Union (Associated General Contractors)*, 186 NLRB No. 70 (1970); *Local 532, United Brotherhood of Carpenters (D. W. Winkelman Co.)*, 189 NLRB No. 94 (1971).

voluntary adjustment), *reversed on other grounds*, 400 U.S. 297 (1971); *New Orleans Typographical Union No. 17* v. *National Labor Relations Board*, 368 F.2d 755, 763 (5th Cir. 1966).

B. *The Issue Presented*

In these circumstances, the ultimate issue before the Court here is whether the Board's consistent construction of the statute is a reasonable interpretation, and therefore should be upheld. For this Court has held on numerous occasions that a consistent interpretation of a statute by an administrative agency should not be overturned where the interpretation is a reasonable construction, though not the only possible construction. *Udall* v. *Tallman*, 380 U.S. 1, 4, 16-18 (1965); *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921); *Universal Battery Company* v. *United States*, 281 U.S. 580, 583 (1930). This has been held particularly true "where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 549 (1940), quoting from *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933).

In *Udall* v. *Tallman*, *supra*, the Court reversed a decision of the District of Columbia Circuit which rejected the Secretary of Interior's construction of an Executive Order and an administrative order issued by the Secretary. In reversing, this Court held (380 U.S. at 4):

> Since their promulgation, the Secretary has consistently construed both orders not to bar oil and gas leases; moreover, this interpretation has been made a repeated matter of public record . . . . The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must there-

fore respect it. McLaren v. Fleischer, 256 U.S. 477, 481; Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414.

Moreover, in discussing the applicable principles in reviewing issues of statutory construction by administrative bodies, the Court commented as follows (380 U.S. at 16):

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Unemployment Comm'n v. Aragon, 329 U.S. 143, 153. See also, e.g., Gray v. Powell, 314 U.S. 402; Universal Battery Co. v. United States, 281 U.S. 580, 583. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" Power Reactor Co. v. International Union of Electrical, etc., 367 U.S. 396, 408.

Applying these principles, the Court stated the following standard as appropriate in the case before it: "If, therefore, the Secretary's interpretation is not unreasonable, if the language of the orders bears his construction, we must reverse the Court of Appeals." 380 U.S. at 18.

We submit that the same standard is appropriate here. We show below that the Board's consistent interpretation of Section 10(k), from the time of its enactment more than 20 years ago, is a reasonable interpretation within the language of the Act and purposes of Congress, and therefore should have been affirmed by the court of appeals below.

II. The Board's Construction Of Section 10(k) Is A Reasonable Interpretation Of The Statutory Language And Fully Comports With The Legislative Purposes

A. *The Statutory Language Requires The Interpretation Given By The Board*

The Board's construction of Section 10(k) to conclude that the employer is one of the "parties" to a jurisdictional dispute for the purposes of the abstention provision of that section fully comports with the plain meaning of the statutory language. Section 10(k), in appropriate part, reads as follows:

> *Whenever* it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and *directed* to determine the *dispute out of which such unfair labor practice shall have arisen, unless*, within ten days after notice that such charge has been filed, the *parties to such dispute* submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. [Emphasis supplied.].

Thus, by its terms Section 10(k) is operative only after a charge under Section 8(b)(4)(D) has been filed with the Board. And "whenever" such a charge is filed, the Board is mandated to "determine the dispute out of which such unfair labor practice shall have arisen, unless . . . the parties to such dispute" agree on a method for the voluntary adjustment of the dispute.

It is plain that the statutory language contemplates that the employer is one of the "parties" to the dispute. The "parties to such dispute", as the abstention provision in § 10(k) reads, refers by its terms to "the dispute out of which such unfair labor practice shall have arisen". The employer is necessarily a "party" to that dispute for there can be no unfair labor practice under

§ 8(b)(4)(D) until one of the unions or employee groups strikes or takes other coercive action *against the employer* to require him to assign the particular work to its members. Thus, the unfair labor practice cannot *arise* until the employer has been brought into the dispute by one of the unions seeking to compel him to grant the result desired.

This Court made this perfectly clear in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261 (1964), where it discussed the relevant statutory provisions as follows (375 U.S. at 263-264 [emphasis supplied]):

> We have here a so-called "jurisdictional" dispute involving two unions and the employer. But the term "jurisdictional" is not a word of a single meaning. In the setting of the present case this "jurisdictional" dispute could be one of two different, though related, species: either—(1) a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another; or (2) a controversy as to which union should represent the employees doing a particular work. *If this controversy is considered to be the former, the National Labor Relations Act* (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 *et seq.*) *does not purport to cover all phases and stages of it.* While § 8(b)(4)(D) makes it an unfair labor practice for a union to strike to get an employer to assign work to a particular group of employees rather than to another, *the Act does not deal with the controversy anterior to a strike nor provide any machinery for resolving such a dispute absent a strike. The Act and its remedies for "jurisdictional" controversies of that nature come into play only by a strike or a threat of a strike. Such conduct gives the Board authority under § 10(k) to resolve the dispute.*

Accordingly, neither Sections 8(b)(4)(D) nor 10(k) are operative until one of the unions has by its coercive action already made the employer a party to the dispute.

This coercive action therefore necessarily makes the employer a party to the "dispute out of which the unfair labor practice" arose, and thus, one of the "parties to such dispute" within the terms of the abstention provision of §10(k).

Further, the language of Section 8(b)(4)(D) also supports the Board's construction. For the plain language therein reflects Congress' recognition that some jurisdictional disputes within the Act's proscription do not involve an active dispute between two rival unions, but actually involve a dispute between a union and an employer over the employer's assignment of particular work to unrepresented employees. *See Local 978, United Brotherhood of Carpenters* v. *Markwell*, 305 F.2d 38, 47 (8th Cir. 1962) (dictum: work-assignment dispute provisions of 8(b)(4)(D) and 303 "are also applicable when the dispute might be said to be solely between an employer and a union"); *National Labor Relations Board* v. *Local 25, I.B.E.W. (Sarrow-Suburban Elec. Co.)*, 383 F.2d 449, 454 (2nd Cir. 1967) (dictum).

The precise language of §8(b)(4)(D) proscribes strikes or other coercion designed to force "an employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . . ." Thus, Congress recognized that an employer may assign work to his own unrepresented employees rather than to employees in a labor organization, and that such an assignment, where a union picketed or struck in protest, should be subject to the same dispute-settling procedures and same protections as other protested work assignments under the Act. Clearly, the real dispute over the work assignment in such a circumstance would in actuality be between the union and the employer making the assign-

ment.[13] Should the union picket in protest of the assignment, the employer manifestly would be one of the parties to the "dispute out of which such unfair labor practice shall have arisen". Accordingly, for this purpose, the language of the statute plainly dictates that the employer is one of the "parties to such dispute" within the meaning of Section 10(k).

Moreover, the language used in Section 8(b)(4)(D) did not appear in the statute through mere inadvertence. That provision, as it passed the Senate, proscribed the use of the prohibited coercion where it was designed to force "any employer to assign to members of a particular labor organization work tasks assigned by an employer to members of some other labor organization. . . ." [14] In conference, the language was amended to include the language which was adopted in the final bill. This change was vigorously opposed on the Senate floor on the ground that it broadened the Senate's objectives in proscribing jurisdictional disputes and also created a technique for employers to undermine craft unions.[15] Senator

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[13] In this situation the union has no active dispute with anyone but the employer. The unrepresented employees are not an entity, have no organization or structure, and have no background or competence to dispute the union's claim for the work or to represent themselves in any dispute-settling mechanism. Most likely, the unrepresented employees made no claim for the work originally but merely accepted the assignment from their employer in the usual course of their employment relationship, but this acceptance does not create a general jurisdictional threat against the union elsewhere. Of course, the union's basic dispute is that it did not get the work; but the thrust of its dispute would obviously be directed more toward the employer's active assignment of the work to these employees than it would be toward the passive act of the employees in accepting it in the line of their employer-employee relationship.

[14] H.R. 3020, as passed by the Senate, 80th Cong., 1st Sess. pp. 81-83, in I Legislative History of the Labor-Management Relations Act (herein "Leg. Hist.") 239-241 (1947).

[15] 93 Cong. Rec. 6662 (Daily ed., June 6, 1947), in II Leg. Hist. 1579 (1947) (remarks of Senator Murray); 93 Cong. Rec. 6672-6673 (Daily ed., June 6, 1947), in II Leg. Hist. 1589 (1947) (remarks of Senator Pepper).

Taft, co-author of the bill and a Senate conferee, responded to this charge by admitting that the conference change would make Section 8(b)(4)(D) applicable to strikes over assignments to nonunion employees as well as to unions, but he denied that it would create a statutory technique for undermining craft unions. Senator Taft responded that Section 8(a)(3) would operate to prohibit any discriminatory work assignments, and he further argued that the salutary objective of the change in conference would be to protect employers from strikes and picketing by unions for the purpose of coercing the employer to assign work to union members rather than to assign the work to non-union employees for legitimate reasons.[16] The bill passed and was signed into law incorporating the language adopted in conference.

Accordingly, Congress plainly intended to bring within the Act's jurisdictional dispute provisions strikes involving disputes which are essentially between a union and an employer over the employer's work assignment to non-union employees. Thus, Congress plainly recognized the employer as one of the parties to such disputes. In the absence of any statutory indications to the contrary, Congress' recognition of the employer as a party to a jurisdictional dispute under this circumstance is weighty evidence that Congress intended that the employer be considered a party to jurisdictional disputes for all purposes under Sections 8(b)(4)(D) and 10(k).[17]

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[16] 93 Cong. Rec. 7000 (Daily ed., June 12, 1947), in II Leg. Hist. 1624 (1947).

[17] As the Board held in *Lodge 68 of the International Association of Machinists (Moore Drydock Company)*, 81 NLRB 1108 (1949) and *International Longshoremen's and Warehousemen's Union, Local 16 (Juneau Spruce Corp.)*, 82 NLRB 650 (1949), there is no statutory language nor persuasive legislative history to support any Congressional desire to limit the application of Section 10(k) only to certain situations. Indeed, as the Board found, the statutory language itself directs the Board to invoke Section 10(k) "whenever" a charge under Section 8(b)(4)(D) is filed.

B. *The Full Legislative History Provides Support For The Board's Interpretation*

The relevant legislative history does not directly resolve the issue of the meaning of "the parties to such dispute" as used in the abstention provision of § 10(k), for the committee reports and floor debates disclose absolutely no discussion of the precise meaning of the word "parties" in this context. However, the legislative history does provide general support for the construction made by the Board.

There was no provision in the House bill comparable to Section 10(k). Instead, the House bill sought to protect employers from all strikes over work assignments. The bill made all "jurisdictional strikes" an "unlawful concerted activity", and provided the injured employer with the right to sue for damages and injunctive relief in a federal district court. The bill defined a jurisdictional strike as a strike or other concerted interference with an employer's operations for an object of requiring "that particular work be assigned to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class".[18] Thus, this bill provided the employer with full protection against any strike over any work assignment, either to union or to non-union employees. And it granted in the employer the full power and right to protect his substantive interests in the assignment by seeking damages and injunctive relief in court in his own right.

The Senate bill, emanating from an amendment offered by Senator Morse, adopted the form and much of the

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[18] See Sections 2(15) and 12(a) of H.R. 3020 (as passed by the House) 80th Cong., 1st Sess., pp. 12, 47-50, in I Leg. Hist. 169, 204-207 (1947). The relevant language therein is identical to the bill as reported by the House Education and Labor Committee, H.R. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 12-13, 47-50, in I Leg. Hist. 42-43, 77-80 (April 11, 1947).

language ultimately enacted. In that bill, Section 8(b)(4)(D) made it an unfair labor practice for a labor organization to strike, or engage in other coercive activity, "for the purpose of forcing or requiring any employer to assign to members of a particular labor organization work tasks assigned by an employer to members of some other labor organization unless such employer is failing to conform to an order or certification of the National Labor Relations Board. . . ." And Section 10(k) set up machinery to decide the underlying dispute by empowering the Board "to hear and determine the dispute out of which such unfair labor practice shall have arisen *or to appoint an arbitrator to hear and determine such dispute*, unless . . . the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute." [19]

In conference, the Senate bill was adopted with two major modifications, both of which provide support for the Board's construction. For one, the provision authorizing the Board to appoint arbitrators "was eliminated . . . leaving it to the Board alone 'to hear and determine' the underlying jurisdictional dispute." *National Labor Relations Board* v. *Radio & Television Broadcast Engineers Union, Local 1212, I.B.E.W. (CBS)*, 364 U.S. 573, 581-582 (1961). This change was vigorously opposed by Senator Morse and others during the Senate's consideration of the conference report bill. They argued that the arbitrator provision was essential because arbitrators had superior technical proficiency and experience over the Board in this area and because they could issue decisions far more quickly than could the Board through its usual

[19] H.R. 3020 (as passed by the Senate), 80th Cong., 1st Sess., pp. 81-82, 100-101, in I Leg. Hist. 239-241, 258-259 (1947). Virtually the same language was contained in the original Senate bill as it was reported from the Committee on Labor and Public Welfare. S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., pp. 14-16, 32, in I Leg. Hist. 112-114, 130 (1947).

procedures.[20] Despite these objections, the Senate accepted these provisions in the conference report bill, and the bill was enacted in that form.

The decision to eliminate the arbitrator provision plainly indicates Congress' preference that the Board, rather than arbitrators, have the ultimate responsibility for determining such disputes. As this Court commented in *CBS*, *supra*, 364 U.S. at 583:

> It might have been better, as some persuasively argued in Congress, to intrust this matter to arbitrators. But Congress, after discussions and consideration, decided to intrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems.

Thus, Congress plainly decided that the public interest in the resolution of work-assignment disputes under 10 (k) was better placed in the hands of the Board than in private arbitrators. In light of this, it would seem totally inimical to this purpose to conclude that Congress intended to oust the Board of jurisdiction under the abstention provision of 10(k) whenever the unions involved in the dispute agreed on some form of binding arbitration to resolve the dispute. To do so would place the public interest in the resolution of such disputes solely in the hands of the unions and any self-serving arbitration machinery they might agree upon.[21] It is more

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[20] 93 Cong. Rec. 6610 (Daily ed., June 5, 1947), in II Leg. Hist. 1554-1555 (1947) (remarks of Senator Morse); 93 Cong. Rec. 6665 (Daily ed., June 6, 1947), in II Leg. Hist. 1585 (1947) (remarks of Senator Murray); 93 Cong. Rec. 6672-6673 (Daily ed., June 6, 1947), in II Leg. Hist. 1589 (1947) (remarks of Senator Pepper).

[21] See *National Labor Relations Board* v. *Local 25, I.B.E.W.*, 396 F.2d 591, 594 (2nd Cir. 1968), where the court pointed out that the Joint Board's practice of affording "little weight to considerations of economy and efficiency" did not accommodate the necessary protection of the public interest. The court explained its view of the proper furtherance of the public interest in this regard as follows:

> It would be surprising, indeed, to find the Board [NLRB], to which is entrusted the protection of the public interest in this

consonant with the Congressional purpose to conclude that, in the abstention provision in Section 10(k), Congress intended that the struck employer as well as the employee groups should agree on any method of voluntary arbitration before the Board's jurisdiction was ousted: the public interest would plainly be better served by having the views presented by all those involved and by having the dispute-settling machinery adopted by all those involved, for the interests of the public are obviously more likely to emerge and be considered when all sides of the controversy are presented and meaningfully considered.

The second major modification in conference was, as discussed above (pp. 22-23), to broaden the scope of the jurisdictional dispute provisions from the "rival unions" concept of the Senate bill to include, as the House bill provided, strikes over the employer's assignment to groups of unrepresented employees. The Senate bill, from its introduction in the form of Senator Morse's amendment, was aimed at jurisdictional disputes within organized labor. Senator Morse's explanation of the bill, and that of its other proponents, discussed the bill in terms of rival unions.[22] Indeed, Senator Morse emphasized that a

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area as in others, completely disregarding the factors of efficiency and economy in reaching its determination as to assignment of work. Nor is there any authority for such a startling proposition as that the national labor policy, which the Board is set up to further, requires that considerations of economy and efficiency in the employment of labor be ignored.

[22] See 93 Cong. Rec. 1890 (Daily ed., March 10, 1947), in II Leg. Hist. 960 (1947) (Senator Morse); 93 Cong. Rec. 4256 (Daily ed., April 28, 1947), in II Leg. Hist. 1057 (1947) (Senator Morse); 93 Cong. Rec. 6610 (Daily ed., June 5, 1947), in II Leg. Hist. 1554-1555 (1947) (Senator Morse); 93 Cong. Rec. 4155 (Daily ed., April 25, 1947) in II Leg. Hist. 1046 (1947) (Senator Murray); 93 Cong. Rec. 4225 (Daily ed., April 28, 1947), in II Leg. Hist. 1056-1057 (1947) (Senator Ellender); 93 Cong. Rec. 4416 (Daily ed., April 30, 1947), in II Leg. Hist. 1157 (1947) (Senator Smith); 93 Cong. Rec. 5063 (Daily ed., May 9, 1947), in II Leg. Hist. 1377 (1947) (Senator Hawkes); 93 Cong. Rec. 6662 (Daily ed., June 6, 1947), in II Leg. Hist. 1579 (1947) (Senator Murray).

major benefit of his bill would be to prevent without resort to the Act's machinery "some of the abuses which we seek to cure because the unions themselves will proceed to establish within their own organizations machinery capable of settling such disputes short of economic action." [23] This concern only with jurisdictional disputes between unions was incorporated in the language of Section 8(b)(4)(D) in the Senate bill, making it unlawful to strike over the assignment to "*members of a particular labor organization*" rather than to "members of some other labor organization . . . ."

The conference bill's broadening of this language to include strikes to force an employer "to assign particular work to *employees* in a *particular labor organization or in a particular trade, craft, or class* rather than to *employees* in another labor organization or in another trade, craft, or class . . . . [emphasis supplied]" plainly adopted the viewpoint of the House bill that *all strikes* against an employer's work assignments should be subject to the Act's machinery, not just those strikes in conjunction with a dispute between two unions over the work. The conferees obviously recognized, in accord with the primary thrust of the House bill, that the employer and not just the unions, had a substantive interest in his assignment of work, and that this interest was entitled to the protections of the Act. Accordingly, in accommodating that valid interest in the framework of the Act, it seems obvious that Congress contemplated that the employer be allowed to protect his interest in the one place where it is substantively affected—in the 10(k) proceedings. Con-

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[23] 93 Cong. Rec. 1910-1911 (Daily ed., March 10, 1947), in II Leg. Hist. 982-983 (1947). Although Senator Morse envisioned his bill would cause unions to establish machinery to settle "such disputes *short of economic action*", he gave no indication that such machinery would be appropriate *after* a strike or other economic action. Indeed, his comments indicate only that an arbitrator would be appointed to resolve the dispute once a work stoppage occurred. *Id.*

gress must have intended therefore to include the employer as a party to a jurisdictional dispute within the meaning of Section 10(k).

C. *The Board's Interpretation Reflects a Recognition Of Economic Realities And Fair Accomodation Of Valid Interests In Conformance With National Labor Policies*

The Board's construction of Section 10(k) reflects its recognition of the basic reality that an employer has a direct and substantial substantive interest in his assignment of work to a particular group of employees, and that fundamental fairness requires that when this assignment is challenged by means proscribed by the statute, any statutory method for resolving the dispute over the work assignment must provide for the right of the employer meaningfully to participate in the dispute-settling process.

It is patently obvious that the employer has a vital and real interest in the assignment of his work and in the substantive outcome of the resolution of disputes challenging such assignments. The employer generally assigns work to a particular group of employees because of his preference for that group for reasons of economy, efficiency, ability, and the like. Where this assignment is challenged, and the work awarded to another group of employees, the result could have a direct impact on the economic welfare, even the economic survival of the employer, particularly in the construction industry where most jurisdictional disputes occur [24] and where the "employers are mostly small, marginal operators . . . ." [25]

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[24] The latest annual report of the Board shows that 66 percent of all jurisdictional dispute charges occurred in the construction industry during that fiscal year. 34 NLRB Ann. Rep. 204-205 (1969).

[25] Comment, *The Employer As A Necessary Party To Voluntary Settlement Of Work Assignment Disputes Under Section 10(k) Of*

In the construction industry, contractors usually obtain jobs through competitive bidding which is "characterized by closely figured bids with narrow profit margins." [26] The contractor's bid is drawn from economic considerations particularly relevant to the group to whom the contractor intends to assign the work, *e.g.*, their wage rates, working rules, relative efficiency, quality of performance, etc. Should a jurisdictional dispute result in the award of this work to a different group with higher cost factors, the contractor's profit margin could be quickly eliminated. Indeed, this result could even cause the contractor to give up the contract. This is shown in the instant case, where a representative of petitioner Martini Tile and Terrazzo Company testified before the Board that, for these reasons, the assignment of the work in dispute to members of the Plasterers rather than members of Tile Setters would deprive Martini of 30 percent of its business annually (A. 128).

In addition, the award of the work contrary to the contractor's desires could also cause him to lose the contract for other reasons. Where a contractor has properly assigned the work pursuant to a collective bargaining agreement with one union, the award of the work to members of a stranger union would force the contractor to give up the contract or else breach his agreement with the union. Of course, the employer would potentially be subject to a damage action under Section 301 of the Act [27] by the contracting union if the contractor did breach the contract and assign the work to the stranger union.[28]

The NLRA, 38 U. Chi. L. Rev. 389, 402 (1971). *See The Wages of Building Zoom*, BUS. WEEK, July 19, 1969, at 89-90; O'Hanlon, *The Unchecked Power of the Building Trades*, FORTUNE, Dec. 1968, at 102.

[26] Comment, *supra* note 25, 38 U. Chi. L. Rev. at 401.

[27] 29 U.S.C. § 185.

[28] It is entirely possible for an arbitration award to assign the work to a stranger union although the employer assigned that work

The employer's very real substantive interest in his assignments of work and the outcome of disputes challenging these assignments has been well recognized.[29] The National Joint Board's inclusion of employer groups within its structure and its requirement that only contractors stipulated to its procedures are bound by its determinations are dramatic acknowledgements of the member unions' recognition of the employer's interest in the outcome of such disputes.[30] Indeed, Professor John T. Dunlop, the first Chairman of the Joint Board, commented on the recognition of the employer's interest after nearly a decade of Joint Board operation:

> The National Joint Board has demonstrated that both contractors and unions have a genuine common interest in jurisdictional issues, and both have a vital contribution to make to their orderly settlement.[31]

Accordingly, the employer's substantial interest in the resolution of disputes over his assignments of work is undeniable. In light of this vital interest, basic and fundamental fairness would seem to require, as the Board's construction of 10(k) does, that the employer be included as a necessary party to any "agreed upon methods for the voluntary adjustment of, the dispute."

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pursuant to a collective bargaining agreement. For example, the National Joint Board does not recognize as valid jurisdictional claims contained in collective bargaining agreements. See K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION: THE CAUSES, THE JOINT BOARD, AND THE NLRB 48 (1961).

[29] Comment, *The Employer as a Necessary Party to Voluntary Settlement of Work Assignment Disputes Under Section 10(k) of the NLRA*, 38 U. Chi. L. Rev. 389, 399-400 (1971).

[30] See STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION: THE CAUSES, THE JOINT BOARD, AND THE NLRB 89-99 (1961).

[31] Letter from John T. Dunlop to the Joint Negotiating Committees, the Secretaries of Signatory National Contractors, and the Associations and Members of the National Joint Board, July 25, 1957, in 40 LRRM 18, 19 (1957).

For otherwise, these interests would be directly affected by a determination made by other parties without his participation and without his assent either to the method of determination or to be bound by the determination.[32] Such a result is plainly offensive to any notion of fair consideration of interests, and has, in an analogous context, been held to violate due process. *See Retail Clerks Union, Local 770* v. *Thriftimart, Inc.*, 59 Cal.2d 421, 423-424, 380 P.2d 652, 655-656 (1963), where Chief Judge Traynor found that due process of law required the invalidation of an "arbitration award in the absence of a party directly affected by the award."[33] In so ruling, Judge Traynor quoted with approval from *Retail Clerks Local 428* v. *L. Bloom Sons Co.*, 173 Cal. App.2d 701, 703, 344 P.2d 51, 52-53 (1959), a case arising in a similar setting, as follows:

> Appellant is, in effect, urging the patently absurd proposition that two parties can by contract effectively stipulate for the mode of determination of the

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[32] It cannot fairly be argued that the employer's interests are not affected by the determination. Under the view of the court below (A. 363, 382-385), the Board would be ousted of jurisdiction under 10(k) whenever the unions involved agreed upon the method of adjustment. The resolution of the dispute under this procedure would then become the official resolution of the dispute under 10(k). Accordingly, should the award favor the striking union the employer would be forced to abide by the resolution reached by the unions or be subject to unlimited picketing on the part of the favored union. Thus, the employer's interests would be legally affected by the voluntary adjustment by the unions. *See* Comment, *supra*, note 25, 38 U. Chi. L. Rev. at 895; Note, 20 Cath. U. L. Rev. 342, 357 (1970).

[33] In that case, the union had a collective bargaining agreement with Thriftimart covering the representation of all Thriftimart's employees. Thriftimart, during the contract term, acquired ownership of all the stock of another company, MORE, through a purchase by one of Thriftimart's wholly-owned subsidiaries. The union claimed its contract covered MORE's employees, and an arbitrator found for the union. In an action to enforce the arbitration award, Judge Traynor reversed the arbitrator's award for the reason discussed above, since MORE was not a party to the arbitration.

> rights of a third party who has not only not assented to such a mode of determination but who also is not even accorded an opportunity to participate in such determination.

Accordingly, the Board's construction of Section 10(k) to require the employer's assent to any voluntary method of adjustment reflects a recognition of economic realities and an accommodation of valid interests with basic requirements of fundametal fairness. And the Board's construction in this regard draws support from other statutory practices and requirements of national labor policy.

Certainly, the employer in jurisdictional dispute has no less an interest in the resolution of the dispute than does the neutral employer in a secondary boycott situation,[34] or than the employer faced with organizational or recognitional picketing at his business operation,[35] or than the employer whose employees are fined for crossing picket lines.[36] Yet, in each of these situations the employer, as the charging party before the Board, just as the employers are in most jurisdictional dispute cases,[37] has the right to full participation in the substantive determination of the issue. The employer embroiled in a jurisdictional dispute is equally entitled to protect his substantive interests; since these interests are litigated only in the 10(k) proceedings, that is where he must be permitted full participation—both before the Board and

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[34] *E.g., Great Northern Railway Co.* v. *National Labor Relations Board,* 272 F.2d 741 (9th Cir. 1959).

[35] *E.g., Centralia Building and Construction Trades Council* v. *National Labor Relations Board,* 363 F.2d 699 (D.C. Cir. 1966).

[36] *E.g., National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175 (1967).

[37] The Board's most recent annual report shows that the employer was the charging party in 535 of 579 jurisdictional dispute cases brought before it in that fiscal year. 34 NLRB Ann. Rep. 197 (1969).

as a necessary party to any "agreed upon method" for voluntary adjustment.

Moreover, the Board's construction is consistent with the requirement under the Railway Labor Act that the Railroad Adjustment Board must determine jurisdictional disputes in a single proceeding involving the *employer and all the unions* involved. *See Transportation-Communications Employees Union* v. *Union Pacific Railroad Company*, 385 U.S. 157 (1966). In that case, the question was whether the Adjustment Board could determine such disputes on an individual contract basis, without the presence of one union. The Court found it could not, and that it was necessary to determine the whole dispute with all parties present: "The railroad, the employees, and the public, for all of whose benefits the Railway Labor Act was written, are entitled to have a fair, expeditious hearing to settle disputes of this nature." *Id.* at 162. Significantly for the purposes here, Justice Stewart admonished the Adjustment Board to consider its decisions in the "industrial context" (385 U.S. at 166-168):

> To do justice to the parties in this situation the Board must take full measure of their circumstances. To justify the deference which the law has given to its decisions, the Board *must employ a decision-making technique that rests on fair procedure and industrial realities.* By using a simple bilateral contract analysis the Board defaults in both of these duties. [Emphasis added.]

Finally, the Board's construction of Section 10(k) to require the employer's assent to any voluntary adjustment is consonant with the underlying basis of all the body of arbitration law that has developed as a vital part of national labor policy, *i.e.*, that arbitration is consensual. It is settled law that parties are obligated to arbitrate only what they have agreed to arbitrate: "For arbitration is a matter of contract and a party cannot be requested to submit to arbitration any dispute which he has not

agreed so to submit." *United Steelworkers* v. *Warrior & Gulf*, 363 U.S. 574, 582 (1960); *accord*, *Retail Clerks Local 770* v. *Thriftimart, Inc.*, 59 Cal.2d 421, 380 P.2d 652, 655 (1963). In accord with this settled law, the Board has required, before it will give deference to an arbitration award for general purposes under the Act, that "all parties" involved must have agreed to be bound by the award. *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). This general policy was cited with approval in *Carey* v. *Westinghouse*, 375 U.S. 261, 270-271 (1964).

For all these reasons, petitioners submit that the Board's interpretation of Section 10(k) to require the employer's assent to any voluntary method of adjustment is a reasonable construction in keeping with fundamental principles of fairness and with statutory and other national policies. In the words of Justice Stewart, the Board's construction "rests on fair procedure and industrial realities" (*Transportation-Communications Employees Union* v. *Union Pacific Railroad Company*, *supra*, 385 U.S. at 167-168), and petitioners submit it is entitled to affirmance.

III. The Decision Of The Court Below Misconceives Salient Factors And Does Not Compel A Contrary Conclusion

The court below, in rejecting the Board's construction of the "parties" to 10(k) proceedings, relied on two basic grounds in concluding that Congress intended to exclude the employer as a party to 10(k) proceedings—(1) that Congress recognized the employer as a neutral party who cared not how the dispute was decided and (2) that the text of the Act shows that Congress intended only that the rival unions were the parties to jurisdictional disputes. We show below that the court's reasoning is erroneous as to both grounds.

A. *The Neutrality Issue*

The central point in the court's analysis is that Congress' purpose in passing the jurisdictional dispute provisions was solely "to protect the employer who was 'neutral' in the dispute" between rival unions (A. 383). According to the court, this "purpose of protecting the neutral employer is fully served by any binding settlement between the disputing employee groups. The neutral employer is one who cares not how the dispute is decided but wants merely that it be decided." (A. 375). Because of this, the court concluded that Congress intended only the "rival unions" as parties to the dispute under Section 10(k).

The court recognized that the statutory provisions, which it referred to as "broad and unqualified in its terms", provided no basis for its neutrality point, but it found its authority from the Act's "dominant purpose to protect 'neutral' employees." (A. 384). The court relied on the following sources as the grounds for showing that dominant purpose.

1. The court relied heavily (A. 374-375) on this court's decision in *National Labor Relations Board* v. *Radio and Television Broadcost Engineers, Local 1212, I.B.E.W. (CBS)*, 364 U.S. 573 (1961), quoting in particular from the Court's analysis of the legislative history of 8(b)(4)(D), as follows:

> And the House Committee report on one of the proposals out of which these sections came recognized the necessity of enacting legislation to protect employers from being "the helpless victims of quarrels that do not concern them at all." [364 U.S. at 580-581].

Although this Court's quotation of the Committee report was entirely accurate for the purpose cited, it provides little, if any, support for the purpose cited by the court below. First of all, this Court cited the Committee

report as part of a chronological development of the legislative history leading to the ultimate conclusion that the purpose of 10(k) was to require the Board to make affirmative resolutions of jurisdictional disputes and "to award such tasks in accordance with its decision." 364 U.S. at 586. The issue of who were the proper parties to the 10(k) proceeding was not in issue because the employer there was avowedly neutral. 364 U.S. at 574-575.

More important, an examination of the House Committee report in full shows that it lends no support to the argument that Congress sought to protect only neutral employers. The full sentence of the report reads as follows:

> *More often than not* the employers are powerless to comply with demands giving rise to the activities, and *many times* they and their employees as well are the helpless victims of quarrels that do not concern them at all.[38]

Thus, the language of the report plainly indicates that it reached situations where the employer was *not* neutral, as well as when he was. Moreover, the statutory language proposed by the Committee (*supra*, pp. 25, 28-29) was perfectly clear that all jurisdictional strikes were considered unlawful without limitation to neutral employer situations. Therefore, reliance by the court below upon this point does not support its contention.

2. The court also placed reliance on the expressed hope of Senator Morse in the floor debates that 10(k) would encourage unions to set up machinery for the settlement of jurisdictional controversies within their own ranks. (A. 376-377). It is clear, however, that Senator Morse was speaking of the settlement of disputes by unions *anterior* to a strike and thus before the Act's provisions

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[38] H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 23, in I Leg. Hist. 314 (1947) (emphasis added).

become operative: in the speech quoted by the court (A. 377) Senator Morse specifically referred to union machinery "settling such disputes *short of economic action*" (emphasis added).[39] Thus, Senator Morse spoke of the hope that unions could in most cases eliminate the dispute among themselves *prior* to embroiling the employer into the dispute *via* coercive economic action; his comments did not indicate that once the coervice action is instituted, the unions could under 10(k) settle the dispute among themselves without the employer's participation. However, the "incentive" to unions to settle the disputes among themselves in order to avoid the Act's machinery is equally present whether or not the employer is considered a party for purposes of Section 10(k).[40]

3. Similarly, other legislative history cited by the court does not support its contention. The court's reference to a sentence in the House Conference Report—describing Section 10(k) as directing the Board "to hear and determine disputes between unions giving rise to unfair labor practices under Section 8(b)(4)(D) (jurisdictional strikes)"—is plainly ambiguous for the issue in dispute here. Since a jurisdictional strike necessarily implicates the employer, the statement as a whole can easily be read to mean that the new 10(k) provision would be applicable when the dispute erupted into a strike and embroiled the three parties—the employer and the unions—before the Board to settle the dispute.

Nor is Senator Morse's definitional memorandum, describing jurisdictional disputes as having as their common ingredient "a controversy between two or more la-

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[39] Senator Morse later made the same point and again referred to machinery settling such disputes "short of economic action." 93 Cong. Rec. 6610 (Daily Ed., June 5, 1947), in II Leg. Hist. 1555 (1947).

[40] In any event, there is no indication in Senator Morse's comments that the inter-union settlement machinery should exclude the employer.

bor unions" (A. 375-376), apposite. Although this definition surely describes the usual jurisdictional dispute, Congress expanded the definition of such disputes in Conference also to include disputes between a union and an employer over his assignment of work to unrepresented employees (*supra*, pp. 22-24, 28-29).

4. Accordingly, as shown above, there is little support in the factors cited by the court below to show that Congress intended to protect only neutral employers to jurisdictional disputes. On the other hand, the court overlooked several salient factors which strongly indicate a contrary intent. First, the language of Section 8(b)(4)(D), changed in Conference to bring under that section assignments of work to an employer's unrepresented employees (*supra*, pp. 22-24) plainly acknowledges Congress' intention to provide the same statutory protections where the employer is actively interested rather than neutral. Second, the text of the statute contains no requirement of employer neutrality, and the Board has specifically rejected the contention that the statute or its legislative history require the application of Section 10(k) only where the employer is neutral and indifferent to the result. *Lodge 68 of the International Association of Machinists (Moore Drydock Co.)*, 81 NLRB 1108 (1949); *International Longshoremen's and Warehousemen's Union, Local 16 (Juneau Spruce Corp.)*, 82 NLRB 650 (1949). And finally, as discussed above, it is plain the employer is rarely neutral and indifferent to the result. In the absence of some convincing legislative history to the contrary, it must be assumed that Congress recognized that reality in the effectuation of the statutory scheme.[41]

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[41] Moreover, as one commentator has noted: "The fact that Congress intended to protect neutral employers does not require the inference that only neutral employers were considered worthy of protection. Indeed, other portions of the brief legislative history on this question suggest that all jurisdictional strikes were to be covered by 8(b)(4)(D) and 10(k), and that the dominant purpose

B. *Interpretation of the Text*

The court below found support for its construction of 10(k) in the text of the statute. According to the court, the words "the parties to such dispute" in Section 10(k) refer to the parties to the underlying jurisdictional dispute, which it found to be the rival unions (A. 371). However, the statutory language does not refer to any "underlying" dispute; the dispute referred to by the language "parties to such dispute" is the "dispute out of which such unfair labor practice shall have arisen . . . ." And, as discussed above, the dispute out of which the unfair labor practice shall have arisen is the strike to compel the employer to assign the work to the striking union's members.

The court also found support from the text in the fact that "Congress could have written § 10(k)" so as to make all the parties to the unfair labor practice charge and the underlying dispute necessary parties "to a procedure for voluntary agreement" (A. 371). But this argument is not availing, for Congress could also have written 10(k) to read "unless the *rival unions involved in the dispute* submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute". Unfortunately, Congress wrote the statute in terms less than patently clear, and it enhances neither side to argue that Congress failed expressly to embrace the opposing position.

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of the statute was the 'elimination of the obstructions to the free flow of commerce' and the preservation of industrial peace by affording quick relief from jurisdictional pickets. Aside from one unexplained reference by Senator Morse to employer 'collusion', the legislative history is completely void of any congressional indication that neutrality was intended to be a prerequisite for 10(k) standing. * * * * The lack of significant legislative or executive comment on the neutrality issue makes it difficult to escape the conclusion that the problem was never really considered in the 10(k) context." Comment, *supra* note 25, 38 U. Chi. L. Rev. at 396-398.

Further, the court found "persuasive evidence" from the failure of Congress specifically to bind the employer to the 10(k) determination (A. 371). But this, too, does not support the conclusion that Congress therefore meant to exclude the employer as a party to such disputes. For 10(k), of itself, binds none of the parties. A union which strikes contrary to the award in a 10(k) determination becomes bound only after an unfair labor practice finding under Section 8(b)(4)(D), which finding would require that the strike or picketing cease. But for practical purposes, the employer is similarly bound, for if he ignores a 10(k) award he is subject to unlimited picketing by the union receiving the award and no Section 8(b)(4)(D) charge will lie. See *Local 502, International Hod Carriers (Cement-Work, Inc.)*, 140 NLRB 694 (1963).

Hence, the employer is under compelling pressure to accept a 10(k) determination, and no "persuasive evidence" can properly be drawn from Congress' failure legally to bind the employer to the 10(k) award unless it can be assumed that Congress did not recognize the economic realities involved.

C. *Other Considerations*

The court's consideration of other factors to support its construction also merits attention.

1. For guidance as to the meaning of "the parties to such dispute", the court relied upon language from *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union, Local 1212, I.B.E.W. (CBS)*, 364 U.S. 573, 579 (1961), where the Court referred to a jurisdictional dispute under 8(b)(4)(D) as "a dispute between two or more groups of employees over which is entitled to do certain work for an employer." Of course, as discussed above (p. 37), the quoted language was dictum, for the Court was not there faced with the issue of

determining the scope of "parties" within Section 10(k).[42] In any event, the language in *CBS* is offset by the Court's subsequent language in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 263 (1964), where the Court referred to a jurisdictional dispute as "involving two unions *and the employer*" (emphasis added).

2. Nor is the court correct in urging that its decision finds support in the strong federal labor policy favoring arbitration (A. 381). As discussed above (pp. 35-36), that policy is premised upon the existence of the mutual consent of the affected parties to arbitrate the matter, a factor which the court's construction overrides. Moreover, this contention begs the issue presented: the issue is not whether arbitration is desirable, but rather, who are the proper parties to the arbitration.[43]

In any event, the Board's interpretation does give full scope to voluntary arbitration within the intent of *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964). That decision recognized the possibility that arbitration without the presence of all parties "may as a practical matter end the controversy or put into movement forces that will resolve it", and that the potential advantage to be gained thereby justified its use. 375 U.S. at 265. The court rec-

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[42] See *Transportation-Communication Employees Union* v. *Union Pacific Railroad Co.*, 385 U.S. 157, 164 (1966), where the Court declined to rely upon dictum from an earlier decision which pointed to a result contrary to that reached by the Court. The Court there expressly "declined to expand" the earlier decision "beyond its holding."

[43] Of course, arbitration has an advantage over NLRB procedures because, as the court below noted (A. 381), of the "relative speed of voluntary arbitration." But Congress specifically rejected this advantage when it chose to grant full responsibility for the resolution of jurisdictional disputes in the Board rather than arbitrators. See pp. 25-28, *supra;* 93 Cong. Rec. 6610 (Daily ed., June 5, 1947), in II Leg. Hist. 1554 (1947) (remarks of Senator Morse). The advantages of the relative speed of voluntary arbitration in no way appears to have dictated Congress' intentions as to the appropriate "parties" to a jurisdictional dispute.

ognized that the Board's "superior authority" may ultimately be invoked to resolve the matter, but that "the Board shows deference to the arbitral award." 375 U.S. at 270-272. The Board's construction here plainly accords with this view.[44]

D. *Summary And Conclusion: The Instant Case*

Petitioners herein submit that the foregoing analysis shows that the court's decision does not compel rejection of the Board's consistent construction of the statute. At best, the court's analysis establishes an arguable construction of the text and legislative history; it plainly fails to establish that the Board's construction is unreasonable. Therefore, petitioners submit that the Board's construction must be upheld. See cases cited pp. 18-19 *supra*.

Indeed, the court's own analysis of the statute is undermined by its recognition that its interpretation of the statute might have to yield where the unions' "procedure for adjustment was subject to an infirmity that undercut its fairness", such as "an inter-union proceeding that made no realistic provision for meaningful attention to the interest of the employer and to questions of efficiency" (A. 384-385).[45] Thus, the court's analysis suffers from

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[44] In the instant case, the Board gave consideration to the award of the Joint Board but declined to accord it "controlling weight" in view of "all the circumstances, including its ambiguous nature, and upon the entire record . . . ." (A. 22.) As a matter of policy, the Board considers Joint Board awards as one of the factors in making its resolution of the merits of a jurisdictional dispute. See *International Association of Machinists, Lodge No. 1743 (J. A. Jones Construction Co.)*, 135 NLRB 1402, 1410-1411 (1962).

[45] The court's conclusion that the National Joint Board is not subject to such infirmity is subject to question. At least one court and many commentators have found that the Joint Board fails to recognize consideration of economy and efficiency in its awards, relying instead essentially upon past agreements and decisions of records, many ancient and outmoded, dating back to 1903. See *National Labor Relations Board* v. *Local 25, I.B.E.W.*, 396 F.2d 591, 594 (2nd Cir. 1968); K. STRAND, JURISDICTIONAL DISPUTES

this retreat away from the adamant position stated throughout its opinion that the Act's protections were designed solely to protect the neutral employer "who cares not how the dispute is decided but wants merely that it be decided" and that such protection is "fully served by *any* binding settlement between the disputing employee groups" (A. 375). The court's reservation in this respect serves to emphasize that the employer *does have* a direct interest in these disputes and that he necessarily must assent to any voluntary arbitration of the dispute before his interests can be affected.

This is emphasized by the facts of the instant case in light of the award of the Joint Board. The petitioning contractors had previously been stipulated to the Joint Board through their association with petitioner Tile Contractors Association, but withdrew along with the Association because of their dissatisfaction with the Joint Board's recognition of managerial factors. Each had a collective bargaining agreement recognizing the Tile Setters' as the representative of their employees (A. 15, 17). Each was satisfied with the "quality of their [Tile Setters'] work and the cost of employing them" (A. 23). When the Plasterers, who had no contract with either contractor, sought the work, the Joint Board awarded the work to Plasterers solely on the basis of an agreement between the respective International Unions dated August 22, 1917, and a decision of record dated February 21, 1924 (A. 315-316, 341-343). The Joint Board articulated no consideration of economy, efficiency, relative skills, ef-

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IN CONSTRUCTION: THE CAUSES, THE JOINT BOARD, AND THE NLRB 45 (1961); Comment, *supra* note 25, 38 U. Chi. L. Rev. at 401 (1971); Note, *The NLRB and Deference to Arbitration*, 77 Yale L. J. 1191, 1200-1201 n. 52 (1968); Note, *The Non-Neutral Employer and Section 10(k) of the NLRA*, 20 Cath. U. L. Rev. 342, 355-356 (1970). For this reason, many employer groups, including petitioner Tile Contractors Association, have withdrawn from the National Joint Board in recent years. See Amicus Brief of Associated General Contractors *et al.* in support of petitions for certiorari in this case, p. 16.

fect of applicable collective bargaining agreements, or employer preference, all factors considered by the Board in reaching the contrary result.

Accordingly, under the court's view, the Joint Board could issue an award, as here, directly affecting the employer's interests without consideration of any managerial necessities and without even the employer's participation. Petitioners submit that the Board's interpretation of the statute is the better view. It rests on fair procedures and industrial realities and protects the interests of the public and all directly involved by requiring, before the Board will abstain from resolving the dispute, that the employer and the employee groups involved jointly agree on a binding method of resolution; it therefore maximizes the full consideration of all the legitimate interests of those involved, a result which best promises to accommodate the public interest.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed, and the case should be remanded to that court for a ruling on the Board's decision on the merits.

Respectfully submitted,

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APPENDIX A

The applicable provisions of the National Labor Relations Act are as follows:

Section 8(b)(4)(D): It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade craft, or class rather than to employees in another labor organization or in another tradecraft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

* * * *

Section 10(k): Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the

Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

* * * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period:

Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL–CIO, ET AL.

No. 1231

TEXAS STATE TILE & TERRAZZO COMPANY, INC. ET AL., PETITIONERS

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL–CIO, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (A. 361–397) is not yet officially reported. The decision and order of the National Labor Relations Board in the unfair

labor practice proceeding (A. 3–13) are reported at 172 NLRB No. 77. The Board's earlier decision and determination of dispute (A. 13–25) are reported at 167 NLRB 185.

JURISDICTION

The judgment of the court of appeals (A. 398–399) was entered on June 30, 1970. The Board's timely petition for rehearing *en banc* was denied on October 1, 1970 (A. 400–401). The petition for a writ of certiorari in No. 1184 was filed on December 30, 1970, and that in No. 1231 on January 13, 1971. The petitions were granted on March 22, 1971 (A. 402). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board has power to determine a jurisdictional dispute under Section 10(k) of the National Labor Relations Act where the competing unions have agreed upon a voluntary method of adjustment, but the employer involved has not consented to be bound by that procedure.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> 4(i) to engage in, or to induce or encourage any individual employed by any person * * * to engage in, a strike or a refusal in the course of his employment to * * * work on any goods,

articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person * * * where in either case an object thereof is:

* * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

* * * * *

Sec. 10. * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) * * *, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

The relevant provisions of the Board's Rules and Regulations (29 CFR 102.1, *et seq.*) are set forth in the Appendix, *infra*, pp. 37–40.

STATEMENT

A. THE UNDERLYING DISPUTES

This case involves picketing by the Plasterers Union ("Plasterers")[1] directed against two different employers—Texas State Tile & Terrazzo Company ("Texas State") and Martini Tile and Terrazzo Company ("Martini")—in furtherance of its demand that the work of applying a coat of Portland cement mortar to walls upon which tile was to be installed should be assigned to employees represented by Plasterers rather than to employees represented by the Tile Setters Union ("Tile Setters").[2]

1. The Anderson library job

In 1965, Southwestern Construction Company ("Southwestern"), a general contractor, entered into a contract with the University of Houston to construct an addition to the University's library. The tile and terrazzo work was subcontracted to Texas State, which commenced work in August 1966. (A. 15; 27–28, 36.) Texas State assigned the tile work to employees represented by Tile Setters, the union with which it had a collective bargaining agreement (A. 15–20; 28, 42, 47, 346–347). This work, which was done after employees represented by Plasterers had applied a thin scratch coat of cement over the metal lath, consisted of applying a second coat of Portland cement mortar and then tile to the stairwells and the

[1] Plasters' Local Union No. 79, Operative Plasterers' and Cement Masons' International Association, AFL–CIO.

[2] Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America, AFL–CIO.

walls of the restrooms of the eight-story library building (A. 16; 29–31, 37–38, 48, 150, 355).

During the fall of 1966, Plasterers advised Tile Setters that the application of the second coat was the work of Plasterers (A. 15; 40–41, 44, 47, 49–53, 356).[3] Tile Setters rejected this claim, whereupon Plasterers submitted the matter to the National Joint Board for the Settlement of Jurisdictional Disputes ("Joint Board"), a tribunal established by the Building Trades Department, AFL–CIO, and certain employer groups (A. 15; 52–53, 306, 322–323; see also 299–303). Both unions are bound by decisions of the Joint Board by virtue of their affiliation with International Unions who were members of the Building Trades Department; however, neither Texas State, the employer who assigned the disputed work, nor the local or national contractors' associations to which Texas State belonged, had agreed to be bound by the procedures

[3] As the court below pointed out (A. 363–364):

"The focus of these jurisdictional disputes can be traced to the development in the mid-1950's of the thin-set or adhesive method of applying tile. Previously it was necessary to set tile in a bed of wet plaster so that moisture would not be absorbed from the bonding agent before it hardened and formed a firm bond. The application of this setting bed or float coat was the work of tile setters. The thin-set method, on the other hand, employed new bonding agents which made it possible to apply tile directly to a smooth surface of dry plaster on a thin coat of dry-set mortar. The Tile Setters contended that they should prepare this smooth plaster surface just as they had prepared the wet setting bed. The Plasterers took the position that the tile setter was only entitled to apply his setting bed and that in the thin-set method it was the dry-set mortar and not the smooth and dry plaster surface which constituted the setting bed."

of the Joint Board (A. 8, 22; 43–44, 46–47, 55, 179–180, 302–303).

The competing unions presented their respective positions to the Joint Board, but Texas State informed the Joint Board that it did not wish to submit the dispute to it (A. 308–309, 322-326, 328–329). On November 9, 1966, the Joint Board awarded the disputed work to Plasterers (A. 15–16; 315–316). Thereafter, Plasterers made several attempts to obtain the work, but Texas State refused to accede to its demands, and assigned the work to Tile Setters (A. 6, 16; 54–55, 180–181, 307, 328–329, 331).

On January 24, 1967, Plasterers commenced picketing at the jobsite to force Texas State to assign the disputed work to employees whom it represented (A. 6–7; 31–33, 54–55, 356). All crafts working on the job honored the picket line, causing a complete work stoppage (A. 7, 31, 40, 46). The picketing ceased after the United States District Court for the Southern District of Texas, upon application of the Board's Regional Director, issued an injunction pursuant to Section 10(l) of the Act, 29 U.S.C. 160(l) (A. 7, 26–27, 356).

2. The Rainbo Bakery job

Martini entered into a contract with Rainbo Baking Company to remodel a panning room at Rainbo's bakery in Houston, Texas (A. 16; 55, 97–98, 107–108). Martini began work on March 15, 1967 (A. 16). It assigned the work, which involved the direct application of a coat of Portland cement mortar to metal lath laid over painted brick, to Tile Setters, with whom Martini had a collective bargaining agreement (A. 16–17, 20;

57–58, 127–128, 346–347, 355). On March 17, 1967, Plasterers picketed the jobsite in order to force Martini to assign the disputed work to employees whom it represented (A. 7–8; 56, 97, 356). At Rainbo's request, Martini removed its employees from the job and the picketing ceased. Thereafter, Martini returned and completed the job without further incident (A. 7–8; 56, 58, 97). Plasterers did not submit the dispute to the Joint Board (A. 17). Neither Martini nor any of the associations to which it belonged were bound by the procedures of the Joint Board (A. 8, 19; 55).

B. THE PROCEEDINGS BEFORE THE NATIONAL LABOR RELATIONS BOARD

1. The Section 10(k) proceeding

Meanwhile, Southwestern and Martini filed unfair labor practice charges with the National Labor Relations Board, alleging that Plasterers' picketing and related conduct violated Section 8(b)(4)(D) of the Act (A. 3–4). The Board's Regional Director found reasonable cause to believe that the charges had merit and, pursuant to Section 10(k) of the Act, issued a notice of hearing to determine the dispute out of which the alleged violation arose (A. 13–14). In April 1967, a hearing was held before a hearing officer of the Board, at which the competing unions and the employers involved—Southwestern, Texas State, and Martini—presented evidence and argument in support of their respective positions (A. 13–14).

On August 22, 1967, the Board issued its decision and determination of dispute. After weighing all the relevant factors presented, including the action of the Joint Board, it concluded with respect to both projects

that employees represented by Tile Setters, rather than those represented by Plasterers, were entitled to perform the work of applying to walls a coat of Portland cement mortar upon which tile was to be installed (A. 20–24).[4] The Board rejected Plasterers contention that, because the disputing unions had agreed upon a method for voluntary settlement, the agency had no authority to adjudicate the disputes; the Board applied its long standing principle that it must determine the dispute under Section 10(k) unless all the parties, including the employers assigning the work, have assented to a voluntary settlement procedure (A. 19). The Board directed Plasterers to notify the Regional Director within 10 days whether it would comply with the Board's determination of the disputes (A. 24–25).

[4] The Board considered the collective bargaining agreements among the parties; employer, area, and industry practice; relative skills and efficiency of operation; agreements between Plasterers and Tile Setters; and, as noted above, the Joint Board award (A. 20–23; 59–96, 105–106, 129, 145–146, 148–149, 165–175, 183–299, 313–314, 317–320, 347, 349–354). The Board declined to accord controlling weight to that award "[i]n view of all the circumstances, including its ambiguous nature" (A. 22; 180–181, 334, 339–343). The Board concluded (A. 23):

"Tile setters are at least as skilled in the performance of the work as plasterers, and both Texas Tile and Martini, which assigned them to the work, have been satisfied with both the quality of their work and the cost of employing them. Moreover, the instant assignments of the disputed work to tile setters are consistent with the explicit provisions of the collective-bargaining agreement between the Tile Setters and Texas Tile and Martini, are consistent with the past practice of the Employers, and are not inconsistent with area or industry practice * * *."

2. The unfair labor practice proceeding

When Plasterers refused to comply with the Board's determination of the work disputes, the General Counsel of the Board issued a complaint upon the 8(b)(4)(D) unfair labor practice charges (*supra,* p. 7), which had been held in abeyance in the hope that the 10(k) determination would obviate the need for deciding the issues raised thereby (A. 4; 357; 29 C.F.R. 102.90, 102.91, App., *infra,* pp. 37–39). The parties waived a hearing before a trial examiner and agreed to submit the matter directly to the Board. The parties further agreed to make the record in the Section 10(k) proceeding a part of the unfair labor practice proceeding. (A. 4–5; 359–360.)

Upon the entire record, the Board concluded that Plasterers had violated Section 8(b)(4)(D) of the Act by picketing the Anderson and Rainbo jobs in order to force Texas State and Martini to assign the disputed work to employees represented by Plasterers rather than employees represented by Tile Setters (A. 9–10). The Board ordered Plasterers to cease and desist from such activity, to post appropriate notices, and to notify the Regional Director what steps had been taken to comply with the order (A. 10–13). The Board again rejected Plasterers' contention that the Board was precluded from hearing and determining the dispute under Section 10(k) because the competing unions had agreed upon a voluntary method of adjustment (A. 8–9).

C. THE DECISION OF THE COURT OF APPEALS

The court below (Judges Leventhal and McGowan, with Judge MacKinnon dissenting) denied enforcement of the Board's order (A. 361–397). The court recognized that Section 10(k) commands the Board to abstain from hearing and determining a work dispute when "the parties to such dispute" have either adjusted the dispute or agreed upon a method for adjustment. It concluded, however, that "[i]t is not the employer but the rival unions (or other employee groups) who are parties to the jurisdictional dispute contesting which employees are entitled to seek the work in question" (A. 371). Accordingly, the court held that "the Board may not properly proceed to determine a jurisdictional dispute pursuant to § 10(k) when the disputing unions have agreed to settle their dispute through binding arbitration" (A. 363).[5]

SUMMARY OF ARGUMENT

The court of appeals held that the Board cannot determine a jurisdictional dispute under Section 10(k) when the competing unions, but not the employer involved, have agreed upon a voluntary method of adjustment. Section 10(k) bars the Board from making that determination if "the parties to such dispute" have voluntarily adjusted, or agreed to adjust, the dispute. Since that section was enacted in 1947, the Board, with hitherto tacit judicial approval, has

[5] Although the Rainbo Bakery dispute was not submitted to the Joint Board, the court of appeals' holding applied to that dispute, no less than to the Anderson Library dispute (which was submitted), because in both cases the two unions had agreed to be bound by the procedures of the Joint Board.

interpreted the phrase "the parties to such dispute," to include not only the competing unions but also the employer who made the work assignment. Hence, unless all three parties have "agreed upon methods for the voluntary adjustment of the dispute," the Board itself must determine the dispute under Section 10(k), irrespective of the employer's neutrality in the controversy.

A. The court below primarily relied on the premise that the "dispute" referred to in Section 10(k) is the jurisdictional dispute over the work assignment, and that the employer is necessarily a neutral party in a jurisdictional dispute. Even assuming the validity of the former assumption, the court erred in failing to recognize that Texas State was a party to that dispute, for, as soon as Texas State refused to assign the work to Plasterers, the latter was as deeply involved in a jurisdictional dispute with Texas State as it was with Tile Setters. Indeed, it is contrary to economic realities to assume that an employer is necessarily a neutral party in a jurisdictional dispute. Although there are some jurisdictional disputes in which the employer may be relatively indifferent as to which group of competing employees gets the work (see *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union (CBS)*, 364 U.S. 573), there are many others in which the employer's economic interests will be directly affected by the assignment of the work. This is particularly true in the building and construction industry, where the award of the work to one group of employees rather than another may result in the substitution of one

contractor for another. See Dunlop, *Jurisdictional Problems in Construction Industry,* 40 LRRM 18, 19. In view of the employer's vital interests in the outcome of jurisdictional disputes, and in view of the fundamental assumption in our law that a party with a direct interest in a controversy is entitled to be heard in the settlement of that controversy, it is highly unlikely that Congress intended to require the Board to defer to a dispute-settlement procedure which does not include the employer who made the work assignment. Moreover, although efficiency and economy are apt to be important factors in the employer's assignment of the work, it is unlikely that a private tribunal would fully develop or give adequate weight to those factors in the absence of the employer's participation in the proceeding.

B. In any event, the "dispute" referred to in Section 10(k) is the dispute over the jurisdictional strike to which the employer is a party. Under the statutory scheme, Section 10(k) does not become operative unless the union seeking the work has directly implicated the employer in the jurisdictional controversy by exerting strike pressure against him, as provided in Section 8(b)(4)(D). Thus, the term "parties to such dispute" encompasses not only the competing unions, but also the employer, who by then has become directly involved.

C. The Board's interpretation of Section 10(k) fully comports with Congress' intent to encourage private settlement of jurisdictional disputes. If all the parties to the dispute have in fact agreed upon a method of adjustment, the Board will not hold a Section 10(k).

hearing if one or more of the parties, including the employer, either refuses to utilize the agreed-upon method or to abide by its decision. If that decision rejects the work claim of the striking union and it nonetheless continues to strike, the General Counsel of the Board will immediately proceed on any 8(b)(4)(D) charge filed against that union. If the decision approves the work claim of the striking union and the employer refuses to assign the work to it, the General Counsel will dismiss the 8(b)(4)(D) charge, thereby leaving that union free to utilize economic pressure against the employer to secure his compliance with the award. Finally, the Board's interpretation leaves competing unions free to utilize interunion procedures, and, if as a result of such procedures one of the unions renounces its claim to the work, there will be no occasion for Board action, since by definition a jurisdictional dispute cannot exist unless there are rival claims to the work.

D. The Board's interpretation is consistent with the legislative history of Sections 8(b)(4)(D) and 10(k). The conference report cited by the court below does not address itself to the issue here. Nor is there support for the court in the quoted remarks of Senator Morse, to the effect that Section 10(k) would encourage interunion settlements of jurisdictional disputes (*infra*, pp. 32–33). There is no inconsistency between encouraging interunion settlements but denying such settlements binding effect when the employer who has a significant interest in the dispute is not a party to its resolution.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT IT IS EMPOWERED TO HEAR AND DETERMINE A JURISDICTIONAL DISPUTE UNDER SECTION 10(k) OF THE ACT UNLESS THE EMPLOYER CONTROLLING THE WORK ASSIGNMENT, AS WELL AS THE COMPETING UNIONS, HAVE AGREED UPON A VOLUNTARY METHOD OF ADJUSTMENT

INTRODUCTION

Section 8(b)(4)(D) of the National Labor Relations Act makes it an unfair labor practice for a labor organization to exert strike pressure for the purpose of forcing "any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class * * *." Unlike the statutory procedure governing other unfair labor practice charges—where an unfair labor practice proceeding is immediately instituted upon the filing of a meritorious charge (Section 10(b), 29 U.S.C. 160(b))—the Act suspends further Board proceedings on the Section 8(b)(4)(D) charge to permit a resolution of the jurisdictional dispute which gave rise to the unfair labor practice charge. Section 10(k) provides that—

> the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. * * *

It has been the Board's consistent position, since Section 10(k) was added to the Act in 1947, that the phrase "the parties to such dispute" includes not only the competing unions but also the employer who made the work assignment; and that unless all three parties—the two unions and the employer—have "agreed upon methods for the voluntary adjustment of * * * the dispute," the Board itself must determine the dispute under Section 10(k).[6]

The court below, however, held that only the competing unions are "the parties to such dispute," and that, if they have agreed to a voluntary method of adjustment, the Board has no power to determine the dispute under Section 10(k) even though the employer involved has not agreed to be bound by that voluntary method.

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[6] See, *e.g.*, *Local 231, Int'l Hod Carriers* (*Middle States Telephone Co.*), 91 NLRB 598, 604 (1950); *United Bro. of Carpenters, Local 943* (*Manhattan Construction Co.*), 96 NLRB 1045, 1048–1049 (1951); *Int'l Union of Operating Engineers, Locals 17, et al.* (*Empire State Painting Co.*), 99 NLRB 1481, 1485 (1952); *United States Assoc. of Journeymen, etc., Local 428*, 108 NLRB 186, 197–198 (1954); *Millwrights Local 1102, United Bro. of Carpenters* (*General Riggers, Inc.*), 127 NLRB 26, 29 (1960); *Int'l Union of Operating Engineers, Local 66* (*Frank P. Badolato & Son*), 135 NLRB 1392, 1395–1396 (1962); *Newspaper & Mail Deliverers' Union of New York* (*News Syndicate Co.*), 141 NLRB 578, 580 (1963); *Operative Plasterers Int'l Assoc.* (*Twin City Tile & Marble Co.*), 152 NLRB 1609, 1611, 1615 (1965); *Int'l Union of Operating Engineers, Local 49* (*Egan-McKay Electrical Contractors, Inc.*), 164 NLRB 672, 673 (1967). *Lodge 68 of the Int'l Assoc. of Machinists* (*Moore Drydock Co.*), 81 NLRB 1108, 1113–1114, 1126–1128 (1949); *Int'l Longshoremen's Union, Local No. 16* (*Juneau Spruce Corp.*), 82 NLRB 650, 655–656 (1949).

The Board's interpretation—which heretofore has tacitly been accepted by the courts of appeals[7]—is sound because (1) it accords with economic reality in its recognition of the vital interest of employers in the resolution of many jurisdictional disputes, (2) it harmonizes Section 10(k) with the companion Section 8(b)(4)(D), (3) it comports with Congress' intent to encourage private settlement of jurisdictional disputes, and (4) it is consistent with the legislative history of the Act.

A. TREATING THE EMPLOYER AS A PARTY TO THE DISPUTE FOR PURPOSES OF SECTION 10(k) ACCORDS WITH ECONOMIC REALITIES

The court below construed the term "such dispute" in Section 10(k) as referring to the underlying jurisdictional dispute as to which union is entitled to the work assignment in question. In concluding that only the competing unions were parties to the "dispute," the court below relied primarily on the ground that the employer in a jurisdictional dispute is a "neutral * * * caught in the crossfire between the disputing unions and unable to satisfy either," and that the "purpose of protecting the neutral employer is fully served by any binding settlement between the disputing employee groups"; he "cares not how the

[7] See *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 326 F. 2d 213, 216 (C.A. 3); *Local 450, Int'l Union of Operating Engineers* v. *Elliott*, 256 F. 2d 630, 635–636 (C.A. 5); *New Orleans Typographical Union No. 17* v. *National Labor Relations Board*, 368 F. 2d 755, 763 (C.A. 5). See also *Quinn* v. *National Labor Relations Board*, 61 LRRM 2690, 2692 (C.A. D.C.), March 29, 1966, concurring opinion of Chief Judge Bazelon.

dispute is decided but wants merely that it be decided" (A. 375),[8]

Even if the court were correct in its assumption that the term "such dispute" refers only to the underlying jurisdictional dispute, (and we show, *infra*, pp. 26–27, that this assumption is incorrect), the court erred in concluding that the employer was not a party to that dispute. To begin with, it was Texas State's refusal to follow the Joint Board award and its subsequent assignment of the work to Tile Setters which induced Plasterers to make further attempts to obtain the work, and, ultimately, to picket. See *supra*, p. 6. As soon as Texas State refused to assign the work to Plasterers, it obviously became a party to the jurisdictional dispute out of which the jurisdictional strike later arose; indeed, at that point Plasterers was as deeply involved in a jurisdictional dispute with Texas State as it was with Tile Setters. As several courts of appeals have recognized, although Section 8(b)(4)(D) and its counterpart Section 303(a)(4) of the Labor Management Relations Act, 29 U.S.C. 187(a)[9] "are of particular aid in disputes involving two rival unions within an employer organization, it is clear

[8] The court also derived support for its view from the failure of Congress expressly to name the employer as a necessary party to a 10(k) proceeding (A. 371). But any inference to be drawn from this circumstance is offset by the fact that Congress could have written the section so as expressly to limit the necessary parties to the rival labor groups involved. It adopted neither course, but instead, used the general language "parties to such dispute."

[9] This provision, now Section 303(a), makes it unlawful "for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 8(b)(4) of * * * [the National Labor Relations Act, as amended]," and gives any

that these sections are also applicable when the dispute might be said to be solely between an employer and a union." *Local 978, United Bro. of Carpenters* v. *Markwell,* 305 F. 2d 38, 47 (C.A. 8); *National Labor Relations Board* v. *Local 25, Int'l Bro. of Electrical Workers* (*Sarrow-Suburban Electric Co.*), 383 F. 2d 449, 454 (C.A. 2).

Furthermore, the notion that an employer is necessarily a neutral party in a jurisdictional dispute is contrary to economic realities, particularly in the building and construction industry. There are, to be sure, some jurisdictional disputes in which the employer may be relatively indifferent as to which group of competing employees performs the work. This was the situation, for example, in *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union* (*CBS*), 364 U.S. 573, relied on by the court below (A. 374–375),[10] where the employer, employing both technicians and stage hands, was neutral as to which group performed the lighting work in dispute. This doubtless explains the Court's characterization of a jurisdictional dispute

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person injured by reason of such violation the right to sue for damages in the Federal district court (Section 303(b)). See *Int'l Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237.

[10] The Court in *CBS* was not concerned with the issue presented in this case, but merely with whether the Board, when it concededly had jurisdiction under Section 10(k), was required to decide the jurisdictional dispute on its merits, taking into account all relevant criteria, or was limited to determining whether one union was entitled to the work by virtue of an outstanding Board certification or contract. The Court held that the Board had the former duty, which it fully discharged here (see n. 4, *supra*).

as "a quarrel between two groups [of employees] which, here as in most instances, is of so little interest to the employer that he seems perfectly willing to assign work to either if the other will just let him alone." Id., at 579. But cf. *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 263: "We have here a so-called 'jurisdictional' dispute involving two unions and the employer."

But there are many disputes in which the employer's economic interests will be directly affected by the assignment of the work and in no meaningful sense can it be said that he is a neutral in the dispute or indifferent to its resolution. A change in the assignment of the work may result, for example, in different terms or conditions of employment, replacement of employees with outsiders, higher wages or costs, or even the displacement of the employer himself (see A. 94–96, 144, 182).[11] In the instant case, for example, neither Texas State nor Martini has an agreement with Plasterers but both had a contract with the Tile Setters governing the work in dispute; an award of the work to Plasterers would have required these contractors either to hire a new complement of employees represented by Plasterers or to give up their subcontract.

In view of the vital interest that the employer may have in the outcome of a jurisdictional dispute, it is highly unlikely that Congress designed a structure for settling these disputes that would bind the em-

[11] See also Comment, *The Employer as a Necessary Party to Voluntary Settlement of Work Assignment Disputes Under Section 10(k) of the NLRA*, 38 U. of Chi. L. Rev. 389, 400–401 (1971).

ployer to a settlement to which he was not a party and in which he had no voice. Indeed, the notion that a party with a direct interest in a controversy (particularly one whose outcome will require specific action by him) is entitled to be heard in the settlement of that controversy is basic to our concept of fair procedure, and is reflected, for example, in our procedural rules dealing with multiparty jurisdiction, especially the rules of intervention (F.R.Civ.P., Rule 24), and in the law of res judicata. See generally, *Developments in the Law—Multiparty Litigation in the Federal Courts,* 71 Harv. L. Rev. 874 (1958). The presumption in favor of giving the right to be heard to all parties with a direct interest in a controversy is so strong that a statute should not be construed to deny that right without strong evidence that Congress intended such a result. No such evidence exists here, either in the language of Section 10(k) or in the legislative history of that Section, which as we show (*infra,* pp. 31–33) does not address the issue in this case.

Indeed, the fact that the National Joint Board includes employer groups in its structure,[12] and operates

[12] The Joint Board was created by an agreement—effective May 1, 1948—between the Building and Construction Trades Department, AFL–CIO, and the Associated General Contractors of America and several speciality contractors' associations. Dunlop, *Jurisdictional Disputes*, New York University, Second Annual Conference on Labor (1949), 496; Amicus Br. of Laborers' Int'l Union in Support of the Petitions for Certiorari, 1a–7a. Since its inception, the Plan has required that the Joint Board consist of an equal number of representatives of employers and unions, and an impartial chairman. Plan for National Joint Board for Settlement of Jurisdictional Disputes (hereafter "plan") Article II, Sec. 1, Amicus Br. for Laborers' Int'l Union, 4a.

under the explicit principle that an employer is not bound by its procedures unless he has specifically so agreed,[13] is a dramatic acknowledgement by the member unions of the importance of the employers' full participation in the dispute settlement processes as well as their vital interest in the outcome of the Joint Board's decision. As John Dunlop, the first chairman of the Joint Board, stated: "The National Joint Board has demonstrated that both contractors and unions have a genuine common interest in jurisdictional issues, and both have a vital contribution to make to their orderly settlement." Dunlop, *Jurisdictional Problems in Construction Industry*, 40 LRRM 18, 19. He also explained:

> The fact that some unions work exclusively, as a matter of policy or custom, for particular contractors tends to convert competition among contractors also into jurisdictional disputes between unions. If a contractor is to hire such a craft he must also hire a subcontractor. More accurately, the dispute is between a contractor

[13] Article V, Sec. 5 of the original Plan, and Article III, Sec. 7 of the provisions in effect at the time of the instant dispute contain the following language (Amicus Br. for Laborers' Int'l Union, *op. cit.*, 7):

"It is understood only those contractors who employ members of the organizations affiliated with the Building and Construction Trades Department of the AFL–CIO, shall be considered as bound by this agreement when they have signed a stipulation setting forth that they are willing to subscribe to and be bound by the terms and provisions of this agreement."

The procedural rules of the Joint Board add (A. 343–344):

"These procedures shall apply to:

(a) Contractors who employ members of the organizations affiliated with the Building and Construction Trades Department, AFL–CIO, and who have signed a stipulation setting forth that they are willing to be bound by the terms of the

and a union on one side against another contractor and union on the other side [Dunlop, *op. cit.*, n. 12, *supra*, at 486].[14]

The court below found "persuasive evidence" for its interpretation in the "fact that the employer is not bound by a 10(k) determination of the Board" (A. 371). But this fact does not lessen the employer's direct interest in the resolution of the dispute or relegate him to the status of a disinterested neutral "who cares not how the dispute is decided but wants

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agreement establishing the Joint Board, or who are members of a signatory association of contractors with authority to bind its members, or who are parties to a collective bargaining agreement providing for the settlement of jurisdictional disputes under the procedures herein set forth * * *."

The original Plan terminated in 1969, when the Associated General Contractors and some specialty contractor associations were unable to secure certain changes. These groups refused to become signatories to a new Joint Board Plan which went into effect on April 3, 1970. Amicus Br. on behalf of AGC, *et. al.*, in Support of the Petitions for Certiorari, 16, n. 7. The new Plan, however, continues to contain the provision requiring the employer to agree to be bound by the Plan. Plan for Settling Jurisdictional Disputes Nationally and Locally, Article III, Sec. 7.

[14] In the brief (prepared by Archibald Cox) which the Joint Board filed with the National Labor Relations Board in the *Acoustical Contractors* case, 119 NLRB 1345 (1958), discussed, *infra*, p. 28, it specificially recognized that, unless all parties, including the employer, were bound by the Joint Board, the National Labor Relations Board was empowered to hear and determine the jurisdictional dispute. The Joint Board urged that therefore the National Labor Relations Board should abandon its pre-*CBS* practice of accepting the employer's work assignment unless the striking union was entitled to the work under an outstanding Board certification or contract (see n. 10, *supra*); for that practice furnished a strong inducement to employers to drop out of the Joint Board and come to the National Labor Relations Board. Jt. Bd. Br. 27, 56, 58–60.

merely that it be decided" (A. 375).[15] Furthermore, a 10(k) determination in favor of the striking union is enforceable against the employer in the sense that it results in an administrative dismissal of the 8(b)(4)(D) charge, thereby leaving the union free to strike the unwilling employer without violating Section 8(b)(4)(D) (see *infra*, p. 28, n. 21).[16] Hence, as a practical matter, the employer is under compelling pressure to accept a 10(k) determination. See also *Local*

[15] The scheme of the Act is such that a Board 10(k) determination does not, by itself, require even the striking union to comply with it. Where the determination is adverse to that union and it nonetheless continues to exert strike pressure, the determination can be enforced against it only through a Section 8(b)(4)(D) proceeding which culminates in an order barring the strike.

Moreover, '[i]n a Section 10(k) proceeding, the Board need only find that there is *reasonable cause to believe* that an 8(b)(4)(D) violation has occurred; in an 8(b)(4)(D) proceeding, findings are based on a *preponderance of the evidence*." *Int'l Typographical Union* (*Worcester Telegram Publishing Co.*), 125 NLRB 759, 761, n. 5 (1959). Accordingly, it is theoretically possible that the Board may even find that its 10(k) determination is not enforceable under 8(b)(4)(D).

[16] While Section 10(k) itself merely provides for dismissal of the 8(b)(4)(D) charge "[u]pon compliance by the parties to the dispute with the decision of the Board * * *," this provision must be read together with Section 8(b)(4)(D), which as shown (see n. 21, *infra*) privileges strike pressure where the "employer is failing to conform to an order * * * of the Board determining the bargaining representative for employees performing such work." Taken together, the two provisions require that the 8(b)(4)(D) charge should be dismissed not only where the striking union complies with the Board's 10(k) determination, but also where the employer declines to comply therewith.

502, Int'l Hod Carriers (Cement-Work, Inc.), 140 NLRB 694 (1963).[17]

Finally, from the employer's standpoint, efficiency and economy are likely to be important factors in determining whether work is assigned to one group of employees rather than to another. The Board, "to which is entrusted the protection of the public interest in this area," takes these factors, as well as others, into account "in reaching its determination as to assignment of work." *National Labor Relations Board* v. *Local 25, Int'l Bro. of Electrical Workers (New York Telephone Co.)*, 396 F. 2d 591, 594 (C.A. 2). It did so here (*supra*, p. 8, n. 4). But without the participation of the employer who made the work assignment, it is unlikely that a private tribunal, such as the Joint Board, would fully develop and give adequate weight to the considerations of economy and efficiency supporting the employer's action.[18] Thus, in

[17] Plasterers contend (Br. in Opp. 13, n. 12) that the secondary boycott provisions of the Act preclude a union from taking effective economic action against a primary employer in the building and construction industry. The union, however, may picket the primary employer at the construction site so long as its picketing conforms to the *Moore Drydock* criteria, 92 NLRB 547, 549 (1950); and, while these criteria are designed to minimize the inevitable impact of the picketing on the neutral employers sharing the work site, they nevertheless afford the union full freedom to appeal to the primary employer, his employees, and his suppliers. See *United Steelworkers* v. *National Labor Relations Board (Carrier Corp.)*, 376 U.S. 492, 499.

[18] In *Int'l Assoc. of Machinists (J. A. Jones Constr. Co.)*, 135 NLRB 1402 (1962), the Board, in response to this Court's decision in *CBS*, n. 10, *supra*, announced that henceforth in making determinations under Section 10(k) it would consider "all relevant factors, e.g., the skills and work involved, certifi-

the present case the Joint Board awarded the disputed work to the Plasterers solely on the basis of a 1917 agreement between the competing International Unions and a 1924 decision interpreting that agreement (A. 316, 341–342), notwithstanding that the dispute involved a method of applying tile which was developed in mid-1950 (A. 18–19, 110, 363).[19] We do not believe that Congress intended to restrict the Board's 10(k) jurisdiction and relegate the determination of a jurisdictional dispute to a procedure in

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cations by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards, and the AFL–CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business. * * *" (Pp. 1410–1411.)

[19] The Joint Board gave recognition to "the interest of efficient job operation" only to the extent of permitting tile setters to apply plaster materials where "the tile to be adhered to the coat of plaster material applied to the initial scratch coat [or] directly to clay or cement block walls is set during the same work day in which such coat is applied" (A. 342).

The Joint Board procedures provide that, in making a job decision, the Joint Board shall utilize the following criteria: "Decisions and agreements of record as set forth in the Green Book, valid agreements between affected International Unions attested by the Chairman of the Joint Board, established trade practice and prevailing practice in the locality." They further provide that the Joint Board "should not ignore the interests of the consumer in settling jurisdictional disputes but should give due regard to such factors as efficiency and economy of operation." (A. 344–345.)

As the Second Circuit has stated, the Joint Board "gives little weight to considerations of economy and efficiency, and * * * past practice is usually held determinative." *National Labor Relations Board* v. *Local 25, Int'l Bro. of Electrical Workers*, *supra*, 396 F. 2d at 594. See also Comment, *op. cit.*, n. 11, *supra*, 38 U. of Chi. L. Rev. at 401–402.

which there is no assurance that all the relevant considerations will be adequately presented.

B. THE DISPUTE REFERRED TO IN SECTION 10(k) IS THE JURISDICTIONAL STRIKE, TO WHICH THE EMPLOYER IS A PARTY

Even if the employer were not a party to the jurisdictional dispute over work assignments, the Board still could make a Section 10(k) determination because the "dispute" referred to in Section 10(k) is not the jurisdictional dispute, but rather the dispute over the jurisdictional strike, to which the employer is obviously a party. As noted, under the statutory scheme, the provisions of Section 10(k) do not come into play until a labor organization strikes, or threatens to strike, for the purpose of forcing an employer to assign particular work to that union rather than to another union or group of employees. Thus, as Judge McKinnon pointed out in dissent (A. 393, emphasis in original), the "words 'such dispute' in Section 10(k) *refer to the dispute out of which the unfair labor practice arose,*" and, under Section 8(b)(4)(D), that is the jurisdictional *strike* in which the striking union attempts to force the "employer to assign particular work to employees * * * [in its union]." Since both the employer and the striking union are parties to the jurisdictional strike, the Board is empowered to proceed under Section 10(k) if the employer has not participated in the voluntary settlement process. The contrary conclusion of the court below, which construed the term "such dispute" in Section 10(k) as referring to the underlying jurisdictional dispute, ignores the fact that, under the statutory scheme,

Section 10(k) does not become operative unless the union seeking the work has implicated the employer in the jurisdictional controversy by exerting strike pressure against him.[20] See *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 263–264.

C. THE BOARD'S CONSTRUCTION OF SECTION 10(k) ACCORDS WITH CONGRESS' OBJECTIVE OF ENCOURAGING PRIVATE SETTLEMENT OF JURISDICTIONAL DISPUTES

The Board's view that the employer is a necessary party to a voluntary method of adjustment for purposes of Section 10(k) comports with Congress' intent to encourage private settlement of jurisdictional disputes. Although the Board does not require the employer to accept such a procedure unless he has so agreed, the Board does not permit the employer, or any other party, to ignore such an agreement.

If all the parties to the dispute have in fact agreed upon a method of adjustment, the Board will not hold a Section 10(k) hearing if one or more of the parties, including the employer, either refuses to utilize the agreed-upon method or to abide by its decision. Similarly, if that decision rejects the work claim of the striking union and it nonetheless continues to strike, the General Counsel of the Board will immediately proceed on any 8(b)(4)(D) unfair labor practice charge filed against that union. See *Int'l Bro. of Teamsters, Local No. 236 (Wm. F. Trayler)*, 97 NLRB 1003, 1006–1007 (1952); *Local Union No. 9,*

[20] During fiscal year 1969, an employer was the charging party with respect to 535 of the 579 charges which were filed under Section 8(b)(4)(D). *Thirty-fourth Annual Report of the National Labor Relations Board* (1969), 197.

Wood, Wire and Metal Lathers Union (A. W. Lee, Inc.), 113 NLRB 947, 953–954 (1955); *Wood, Wire and Metal Lathers Union, Local No. 2 (Acoustical Contractors Assoc. of Cleveland)*, 119 NLRB 1345, 1350–1355 (1958); *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 410 F. 2d 5, 8–9 (C.A. 3), reversed on other grounds, 400 U.S. 297; 29 C.F.R. 102.93, App., *infra*, pp. 39–40. On the other hand, if the arbitrator's decision approves the work claim of the striking union and the employer refuses to assign the disputed work to it, the General Counsel will dismiss the 8(b)(4)(D) charge filed against that union, thereby leaving the union free to utilize economic pressure against the employer to secure his compliance with the award.[21] Parties who agree to a voluntary method of settling jurisdictional disputes are thus under strong practical pressure to accept the determination of the tribunal they have selected.

The reliance of the Court below on *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, and the "general principle that full scope should be given to voluntary arbitration procedures" (A. 381) is misplaced. Nothing in the Board's decision here precludes the Joint Board,

[21]By its terms, Section 8(b)(4)(D) exempts economic pressure where the "employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." Since the decision in *CBS*, n. 10, *supra*, the General Counsel has viewed a Board 10(k) award as an "order" within the meaning of the exemption to Section 8(b)(4)(D). He would give equivalent effect to a jurisdictional award by a private tribunal to which all of the parties have bound themselves. (See 29 C.F.R. 102.91, 102.93, App. *infra*, pp. 39–40.)

even though it has jurisdiction only over the two unions, from attempting to resolve the jurisdictional dispute; and if, as a result of its efforts the striking union relinquishes its claim to the work, there will be no occasion for Board action. In *Carey*, however, the Court specifically recognized that, if the arbitrator does not have jurisdiction over all the parties, the policy favoring arbitration does not preclude the National Labor Relations Board from redetermining the matter. The Court held in *Carey* that it was not incompatible with the National Labor Relations Act for one union to compel the employer to arbitrate a jurisdictional dispute even though the competing union was not a party to the arbitration proceeding. The Court stated, however, that, "[s]hould the Board disagree with the arbiter * * *, the Board's ruling would, of course take precedence * * *. The superior authority of the Board may be invoked at any time." 375 U.S. at 272.[22]

Nor can it properly be asserted, as was contended before the Board changed its policy in response to this Court's decision in *CBS, supra* p. 18, that the criteria utilized by the Board in determining jurisdictional disputes unduly encourage the employer, or the union which has been assigned the work, to prefer a Board determination of the dispute to a private method of adjustment. As shown (p. 24, n. 18), the Board

[22] The National Labor Relations Board gives strong consideration to decisions of the Joint Board and to agreements between International Unions. See *Local 68, Wood, Wire & Metal Lathers Int'l Union (Acoustics & Specialties, Inc.)*, 142 NLRB 1073, 1079 (1963); *Sheet Metal Workers Int'l Ass'n, Local 162 (Lusterlite Corp.)*, 151 NLRB 195, 202 (1965); *Millwrights Local Union No. 1102 (Don Cartage Co.)*, 160 NLRB 1061, 1080 (1966).

makes its determination after considering all of the relevant factors. If a private method of adjustment, like the Joint Board, were to utilize the same criteria, and clearly to indicate that it did so in arriving at its ultimate determination, there is no reason to believe that any of the parties would be prompted to choose the National Labor Relations Board over the private procedure.[23]

[23] The court below also found support for its position that the employer is not a necessary party to the resolution of a jurisdictional dispute in the Board's *Safeway* doctrine (A. 383–384). In *Safeway* and other similar cases (*Highway Truckdrivers, Local 107* [*Safeway Stores, Inc.*], 134 NLRB 1320 (1961); *Local 1905, Carpet Linoleum Layers (Butcher and Sweeney Constr. Co.)*, 143 NLRB 251 (1963)), the Board has dismissed 10(k) proceedings upon finding that either the union originally seeking the work, or the one performing it, has renounced any claim thereto. However, these decisions rest on the theory that the Board has power, under Section 10(k), only to hear and determine the merits of a jurisdictional dispute and that, by definition, such a dispute cannot exist unless there are rival claims to the work. That condition was met here for, notwithstanding the Joint Board determination, both the Tile Setters and the Plasterers continued to claim the work in question (A. 51–55, 180–181, 307, 331). See also *National Labor Relations Board* v. *Local 25, Int'l. Bro. of Electrical Workers*, *supra*, 383 F. 2d at 454.

We believe that the court below was overly optimistic in asserting that "the availability of a binding agreement between the disputing unions creates means of enforcing a permanent resolution of the jurisdictional dispute not otherwise available to the Board" (A. 381–382). Where the employer has not agreed to be bound by a Joint Board decision, a union which gets an award in its favor may be able to obtain, in a suit under Section 301 of the Labor-Management Relations Act (29 U.S.C. 185), an order compelling the losing union to abandon its claim to the work in dispute. But such an order does not necessarily require the employer to assign the work to the winning union.

D. THE BOARD'S INTERPRETATION IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF SECTIONS 8(b)(4)(D) AND 10(k)

The court of appeals (A. 375–378) placed considerable emphasis on the legislative history of Section 10(k). In support of its interpretation, the court cited only a reference in the House Conference Report to jurisdictional disputes as "disputes between unions" and a number of comments by Senator Morse, who submitted the original proposal for what later became, with considerable deletions, Section 10(k), to the effect that the enactment of that provision would encourage unions to settle their own jurisdictional disputes.

The debates and committee reports, however, do not discuss what Congress meant by the term "parties to such dispute" in Section 10(k). As Judge MacKinnon pointed out in dissent, "there is a very good reason" why the "members of Congress just did not address themselves to the point" (A. 391):

> The bill originated in the House and at that stage it merely defined jurisdictional strikes and made them unlawful * * *. This treatment of jurisdictional strikes was supplanted in the Senate bill by a section 10(k) the principal provision of which empowered and authorized the NLRB to appoint an arbitrator to hear and determine such disputes. This provision for the NLRB appointment of an arbitrator was removed in the Conference Committee and section 10(k) then for the first time assumed its present character * * *. While the 10-day provision was always a part of 10(k) from the time it emerged in the Senate bill it attracted

no notice because it was always overshadowed by the provision for the Board to appoint an arbitrator.[24]

The passage from the House Conference Report, on which the court of appeals relied (A. 377–378; H. Rep. No. 510, 80th Cong., 1st Sess., 57, 1 Leg. Hist.[25] (1947) 561), does not support its conclusion. Although the language the court emphasized states that Section 10(k) would empower the Board to hear and determine "disputes between unions," this statement is followed by the phrase "giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes)." Since a jurisdictional strike necessarily implicates the employer, the passage as a whole is equally consistent with the Board's view that, by the time a jurisdictional dispute is ripe for Board determination under Section 10(k), there are three parties—the two unions and the employer who is being pressured to change his work assignment.[26]

Furthermore, the expressed hope of Senator Morse

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[24] The legislative history is detailed in *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union* (*CBS*), *supra*, 364 U.S. at 581–582.

[25] "Leg. Hist. (1947)" refers to the two volume legislative history of the Labor-Management Relations Act, 1947 (G.P.O. 1948).

[26] Similarly, the other definitional remarks in the legislative history which describe a jurisdictional dispute as a controversy between two or more unions (see, *e.g.*, 93 Cong. Rec. 1824, 2 Leg. Hist. (1947) 951 (Senator Morse)) merely reflect the fact that such a dispute usually focuses on interunion controversy. These observations certainly do not compel the inference that Congress intended that the employer not be heard on the merits of the dispute, particularly where it has resulted in a strike against him.

(who proposed the arbitration provision which was ultimately deleted) that Section 10(k) would encourage unions to set up machinery for the settlement of jurisdictional disputes within their own ranks (A. 377; 93 Cong. Rec. 1845, 2 Leg. Hist. (1947) 983) does not support the court of appeals' interpretation. There is no inconsistency between encouraging inter-union settlements, but denying such settlements binding effect when the employer who has a significant interest in the dispute is not a party to its resolution. Moreover, in the statement which the court below cited, Senator Morse specifically referred to union machinery "settling such disputes *short of economic action*" (*ibid.*, emphasis added). In other words, he expressed the belief that, with the prospect looming of governmental resolution of the dispute under Section 10(k), the unions would in most cases resolve the dispute among themselves *without* embroiling the employer through coercive economic action; his comments do not indicate that, once such action is utilized, the unions could, under Section 10(k), settle the dispute solely between themselves without the employer's participation.

In sum, the Board's conclusion that the phrase "parties to such dispute" in Section 10(k) includes not only the competing unions, but the employer who made the work assignment, is a reasonable interpretation of the Act and is consistent with its purposes. Moreover, the Board's interpretation is entitled to special weight, since it was adopted shortly after Section 10(k) was enacted and has consistently been adhered to for more than 20 years. See *National Labor Relations Board* v.

Coca-Cola Bottling Co., 350 U.S. 264, 269; *Udall* v. *Tallman*, 380 U.S. 1, 16–17; *Griggs* v. *Duke Power Co.*, No. 124, 1970 Term, 39 U.S.L.W. 4317, 4320, March 8, 1971.[27] The Board's interpretation should thus have been accepted by the court below.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case should be

[27] Since 1949, this interpretation was set forth in several annual reports which the Board submitted to Congress. See, e.g., *Fourteenth Annual Report of the National Labor Relations Board* (G.P.O., 1949), 99–102; *Seventeenth Annual Report of the National Labor Relations Board* (G.P.O., 1952), 195–196; *Twentieth Annual Report of the National Labor Relations Board* (G.P.O., 1955), 117–118; *Twenty-first Annual Report of the National Labor Relations Board* (G.P.O., 1957), 119; *Twenty-third Annual Report of the National Labor Relations Board* (G.P.O., 1958), 101–102. Yet, in 1959, when Congress enacted extensive revisions to the Act—including an amendment to Section 8(b)(4)—no change was made in either the procedural or substantive provisions respecting jurisdictional disputes. See *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 366.

remanded to that court with directions to consider the Board's decision on the merits.

Respectfully submitted.

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MAY 1971.

APPENDIX

The relevant provisions of the National Labor Relations Board rules and regulations (29 CFR. 102.1, *et. seq.*) are as follows:

SUBPART F—PROCEDURE TO HEAR AND DETERMINE DISPUTES UNDER SECTION 10(k) OF THE ACT

SEC. 102.89 *Initiation of proceedings.*—Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) of the act, the regional director of the office in which such charge is filed or to which it is referred shall, as soon as possible after the charge has been filed, serve on the parties a copy of the charge together with a notice of the filing of the charge and shall investigate such charge and if it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(l) of the act, he shall give it priority over all other cases in the office except other cases under section 10(l) and cases of like character.

SEC. 102.90 *Notice of filing of charge; notice of hearing; hearing; proceedings before the Board; briefs; determination of dispute.*—If it appears to the regional director that the charge has merit and the parties to the dispute have not submitted satisfactory evidence to the regional director that they have adjusted, or have agreed upon methods for the voluntary adjustment of the dispute out of which such unfair labor practice shall have arisen, he shall cause to be served on all parties to such dispute a notice of hearing under section 10(k) of the act before a hearing

officer at a time and place fixed therein which shall be not less than 10 days after service of the notice of the filing of said charge. The notice of hearing shall contain a simple statement of the issues involved in such dispute. Such notice shall be issued promptly, and, in cases in which it is deemed appropriate to seek injunctive relief pursuant to section 10(l) of the act, shall normally be issued within 5 days of the date upon which injunctive relief is first sought. Hearings shall be conducted by a hearing officer, and the procedure shall conform, insofar as applicable, to the procedure set forth in sections 102.64 to 102.68, inclusive. Upon the close of the hearing, the proceeding shall be transferred to the Board and the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, to determine the dispute or make other disposition of the matter. Should any party desire to file a brief with the Board, eight copies thereof shall be filed with the Board at Washington, D.C., within 7 days after the close of the hearing: *Provided, however,* That, in cases involving the national defense and so designated in the notice of hearing, no briefs shall be filed, and the parties, after the close of the evidence, may argue orally upon the record their respective contentions and positions: *Provided further,* That, in cases involving the national defense, upon application for leave to file briefs expeditiously made to the Board in Washington, D.C., after the close of the hearing, the Board may for good cause shown grant such leave and thereupon specify the time for filing. Immediately upon such filing, a copy shall be served on the other parties. Such brief shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Requests for extension of time in

which to file a brief under authority of this section shall be in writing and received by the Board in Washington, D.C., 3 days prior to the due date with copies thereof served on the other parties. No reply brief may be filed except upon special leave of the Board.

SEC. 102.91 *Compliance with determination; further proceedings.*—If, after issuance of the determination by the Board, the parties submit to the regional director satisfactory evidence that they have complied with the determination, the regional director shall dismiss the charge. If no satisfactory evidence of compliance is submitted, the regional director shall proceed with the charge under paragraph (4)(D) of section 8(b) and section 10 of the act and the procedure prescribed in sections 102.9 to 102.51, inclusive, shall, insofar as applicable, govern. *Provided, however,* that if the Board determination is that employees represented by a charged union are entitled to perform the work in dispute the regional director shall dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

SEC. 102.92 *Review of determination.*—The record of the proceeding under section 10(k) and the determination of the Board thereon shall become a part of the record in such unfair labor practice proceeding and shall be subject to judicial review, insofar as it is in issue, in proceedings to enforce or review the final order of the Board under section 10 (e) and (f) of the act.

SEC. 102.93 *Alternative procedure.*—If either before or after service of the notice of hearing, the parties submit to the regional director satisfactory evidence that they have adjusted the dispute, the regional director shall dismiss the charge and shall withdraw

the notice of hearing if notice has issued. If, either before or after issuance of notice of hearing, the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if notice has issued. If it appears to the regional director that the dispute has not been adjusted in accordance with such agreed-upon methods and that an unfair labor practice within the meaning of section 8(b)(4)(D) of the act is occurring or has occurred, he may issue a complaint under section 102.15, and the procedure prescribed in sections 102.9 to 102.51, inclusive, shall, insofar as applicable, govern; and sections 102.90 to 102.92, inclusive, are inapplicable. Provided, however, that if an agreed-upon method of voluntary adjustment results in a determination that employees represented by a charged union are entitled to perform the work in dispute the regional director shall dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, et al.

No. 1231

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC., *Petitioners*,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, AMICUS CURIAE

INTEREST OF THE AMICUS

This brief is submitted pursuant to Rule 42(2) of the Rules of this Court in support of the position of the Respondents in these cases, urging affirmance of the decision by the United States Court of Appeals for the District of Columbia Circuit. The written consent of all parties to these cases for the filing of this brief has been secured.

These cases arise out of a jurisdictional dispute between Plasterers' Local Union No. 79 and Tile Setters Local Union No. 20 which are affiliated with the Operative Plasterers and Cement Masons International Association (Plasterers) and the Bricklayers, Masons and Plasterers' International Union of America (Bricklayers), respectively. The Building and Construction Trades Department, AFL-CIO (hereinafter, "Department") was established in 1908 and is composed of the seventeen National and International Union affiliates of the AFL-CIO which represent employees in the building and construction industry, including the Plasterers and Bricklayers International Unions, and the Laborers' International Union of North America which has filed a brief, *amicus curiae,* in this Court. (The seventeen affiliates of the Department are listed in Appendix A hereto.) The Department's affiliates represent more than three million employees in the industry. Among the Department's "objects and principles," as stated in Article II of its Constitution, are the following:

> "(6) To secure the adjustment of trade and jurisdictional disputes in the building and construction trades industry along practical lines as they may arise from time to time; and such decisions to be final and binding on all affiliated National and International Unions and their affiliated Local Unions.
>
> • • •
>
> "(8) To promote industrial peace and develop a more harmonious feeling between employers and employees.
>
> • • •

"(10) . . . to protect and advance the interests of the building and construction trades industry.

* * * *

"(11) To engage in . . . legal . . . activities appropriate for the advancement of the interests of affiliated unions and their members in the building and construction industry."

Jurisdictional disputes between building trades unions have long been a major problem in the construction industry, affecting unions and the employees they represent, employers and the public. In 1948, the Department duly adopted the "Plan for Settling Jurisdictional Disputes Nationally and Locally" (hereinafter, "Plan") as the method by which jurisdictional disputes between or among its affiliated National and International Unions or their affiliated local unions should be resolved. The Plan, as revised, continues in effect today. But its effectiveness, which is essential to the maintenance of industrial peace in the building and construction industry, has long been threatened by the position of the NLRB in its interpretation of Section 10(k) of the Act. It is the Department's considered belief that the decision by the court below, if affirmed by this Court, will strengthen the Plan and thus help to stabilize labor relations in the building and construction industry.[1]

SUMMARY

This brief discusses the operations of the Plan for Settling Jurisdictional Disputes Nationally and Locally and administrative considerations in connection therewith. The legal arguments for the entire labor movement, in-

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[1] This brief is filed in accordance with the resolution adopted in November, 1968 by the Executive Council of the Department, which is the governing body of the Department between Conventions (Department Constitution, Art. VII, Sec. 2). This resolution was approved by the Convention of the Department in September, 1969. (Report of Proceedings of the Fifty-Fifth Convention of the Building and Construction Trades Department, AFL-CIO (1969), pp. 92, 296-298.)

cluding the Building and Construction Trades Department, AFL-CIO, are presented in the brief, *amicus curiae,* filed by the AFL-CIO in support of the decision by the court below.

The Plan, which was established in 1948, is binding on all seventeen affiliates of the Building and Construction Trades Department and through them on three million organized building and construction tradesmen. The Plan is operative as between unions regardless of whether or not the employer in question is stipulated to the Plan. It serves as a tripartite arbitration award mechanism binding on the employer, when the employer is stipulated to the Plan.

All three tribunals which are part of this Plan, i.e., the National Joint Board, the Appeals Board and the Hearings Panels, are established on a tripartite basis: public, labor and industry members. The procedure has been recognized by the National Labor Relations Board as a method for voluntary adjustment under Section 10(k) of the Act.

The Plan has resulted in the elimination of many work stoppages and other impediments to job progress by preventing jurisdictional disputes from arising and, where they do arise, by deciding them in short order. The average length of time for such decision is two weeks. In contrast, the median time for decision by the NLRB under Section 10(k) in fiscal year 1970 was 230 days.

A continued threat to the effectiveness of this mechanism which has served the industry for more than twenty-three years is the competitive aspect of the NLRB as a tribunal available for forum shoppers. This results from the NLRB's interpretation of the term "parties to the dispute" in Section 10(k) (rejected by the court below) as authorizing a governmental determination of the jurisdictional dispute when the employer is not stipulated to the Plan.

DESCRIPTION OF THE "PLAN FOR SETTLING JURISDICTIONAL DISPUTES NATIONALLY AND LOCALLY"

Historical Development

Beginning with the formation in 1897 of the National Building Trades Council, the forerunner to the present Building and Construction Trades Department of the AFL-CIO, many attempts were made within the structure of the building trades unions to settle privately jurisdictional disputes.[2] In 1919, the National Board for Jurisdictional Awards was established by the Department. This was the first national joint body composed of representatives of construction unions and employer groups.[3] After this Board failed, several other methods were later tried including a Referee System with referees chosen variously from management or labor.[4] As the Supreme Court stated in *NLRB v. Radio and Television Broadcast Engineers Union* ("CBS"), 364 U.S. 573, 580 (1961), "Each of these efforts [in the construction and other industries] had helped some but none had achieved complete success. The result was a continuing and widely expressed dissatisfaction with jurisdictional disputes."

Prior to the passage of the Labor Management Relations Act in 1947, the Department commenced negotiations to establish new private machinery for the settlement of jurisdictional disputes in the building and construction industry. The "Plan for Settling Jurisdictional Disputes Nationally and Locally" became effective on May 1, 1948.

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[2] See Dunlop, *"Jurisdictional Disputes,"* NYU 2d Annual Conference on Labor 477, 494 (1969); Haber and Levinson, *Labor Relations and Productivity in the Building Trades*, 234 (1960); Rains, *"Jurisdictional-Dispute Settlements in the Building Trades,"* 8 Lab. L. J. 385 (1957); Kenneth T. Strand, *Jurisdictional Disputes in Construction: The Causes, the Joint Board, and the NLRB*, 61 (1961) (hereinafter, *Strand*).

[3] *Strand, supra* note 1, at 64.

[4] *Id.* at 67, 68. See also Dunlop, *supra* note 1, at 494-95.

(Report of Proceedings of the Forty-First Annual Convention of the Building and Construction Trades Department, AFL (1948), p. 117.) It was an agreement at two levels. First, it was the procedure adopted by the Department on behalf of its affiliated National and International Unions by which jurisdictional disputes between or among them or their affiliated local unions should be resolved. Second, it was an agreement among the Department, the Associated General Contractors of America, and seven national specialty contractors associations.

The Plan was included in the Constitution of the Department, in 1948, as Section 37. (Report of Proceedings of the Forty-First Annual Convention of the Building and Construction Trades Department, AFL (1948), pp. 15-19.)

In 1955, Section 37 of the Department Constitution was amended to read as follows:

> "Such Plan for the Settlement of Jurisdictional Disputes recognized by the Building and Construction Trades Department shall be recognized by and binding on all affiliates."

(Report of Proceedings of the Forty-Eighth Annual Convention of the Building and Construction Trades Department, AFL (1955), pp. 21, 191-194.)

Since 1957, when a new Department Constitution was adopted (Report of Proceedings of the Special Convention of the Building and Construction Trades Department, AFL-CIO (1957), pp. 42-55), Article X of the Department Constitution has provided:

> "All jurisdictional disputes between or among affiliated National and International Unions and their affiliated Local Unions and employers shall be settled and adjusted according to the present plan established by the Building and Construction Trades Department, or any other plan or method of procedure adopted in the future by the Department for the settlement of jurisdictional disputes. Said present plan or any other plan adopted in the future shall be recognized as final

and binding upon the Department and upon all affiliated National or International Unions and their affiliated Local Unions."

The Plan has been reviewed and revised from time to time since its inception in 1948 and, with some change in sponsoring employer organizations, has been functioning during the past twenty-three years in the prevention and settlement of jurisdictional disputes in the building and construction industry.[5]

The Plan is contained in a book commonly and hereafter referred to as the "Green Book," published by the Department. The Procedural Rules and Regulations ("Regulations") implementing the Plan are contained in a book commonly and hereinafter referred to as the "Blue Book." These books are attached hereto in Appendices B and C, respectively.

The Current Plan—General Statement

The current agreement, which became effective April 3, 1970, was signed by the Department, and by the "Participating Contractors Employers' Associations" (PCEA) comprising thirteen national associations of employers whose membership consists of more than 25,000 contractors in the building and construction industry. (These thirteen associations are listed in Appendix A hereto.) The signing of the agreement was witnessed by then-Secretary of Labor George P. Shultz. (Green Book, p. 14).[6]

The Plan provides for three different decision-making

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[5] At the time of the briefing and oral argument before the Court of Appeals in the instant case, the Plan then in effect had been approved by the General Presidents of the Department's National and International Unions on January 13, 1965, and signed by representatives of the participating organizations at the White House on February 2, 1965. That revised Plan became effective April 1, 1965.

[6] The Secretary of Labor issued the following Statement following the signing ceremony (USDL 11-150, April 7, 1970):

"In establishing the Construction Industry Collective Bargaining Commission last year, President Nixon expressed this Adminis-

bodies: (1) The National Joint Board for the Settlement of Jurisdictional Disputes ("Joint Board"), created at the outset in 1948, to consider particular disputes arising on specific jobs and to render job decisions applicable to the particular job (or, in some situations, more broadly applicable to a locality); (2) the Appeals Board, created in 1965, to consider appeals from job decisions of the National Joint Board; and (3) *ad hoc* Hearings Panels, provided for from the outset of the Plan in 1948, to make decisions involving repetitive disputes, on a national basis. This machinery also operates at each level to encourage the voluntary settlement of jurisdictional disputes by direct negotiations and mediation.

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tration's deep commitment to the institution of free collective bargaining.

"For this institution 'to survive and prosper,' he said, 'the parties must assume the full share of their responsibility to the industry and to the Nation.'

"Today, I am gratified to participate in an occasion that symbolizes this assumption of private responsibility by labor and management in the Nation's vital building and construction industry.

"The Building and Construction Trades Department, AFL-CIO, and the participating contractors employers' associations have signed an important agreement that provides more effective procedures for settling jurisdictional disputes locally and nationally.

"By not only continuing but revitalizing the 22-year-old National Joint Board, the parties have strengthened the construction industry's machinery for dealing with these troublesome and costly disputes.

"Significantly, the agreement broadens Board representation by various segments of the industry, provides procedures for handling the most serious and recurring disputes and specifically considers consumer interests along with the interests of workers and employers.

"The National Joint Board—established just after World War II—functions as the building and construction industry's response to the type of private, voluntary solutions to jurisdictional disputes sought by the Congress when it enacted the Taft-Hartley Act.

"In January, the Construction Industry Collective Bargaining Commission, with members representing labor, management and the public, endorsed the development of private, dispute-settling procedures by the parties themselves. This agreement dealing with jurisdictional disputes—the product of hard and long negotiations—embodies just that kind of healthy, private action."

The Plan is structured whereby the members of each of these three bodies are appointed by the signatories from their affiliated Unions and employer associations in a manner so as to provide maximum and fair representation to the interests of each of these groups. (See the discussion, *infra* at 16-21 regarding the operational features of the Plan.)

Contrary to the statements in Laborers' Union's brief (pp. 25-27), the Secretary of Labor's statement (*supra* n. 6) correctly reflects the fact that the Unions and employer associations affiliated with the signatories to the current Plan bring to it a broader representation of the building and construction industry than previously has been the case.

Unlike many other industries, the building and construction industry is a multi-employer industry with thousands of contractors and many trade associations to which they belong. The fact that some of these associations have failed or refused to join in signing the Plan or that certain of these associations, such as the Associated General Contractors (AGC), have withdrawn their previous signatures to the Plan (see Laborers' brief, p. 23), by no means renders the current signatories unable to represent the interests of employers in every segment of the industry.[7]

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[7] Some of the thirteen associations comprising the PCEA have bound their contractor members to the Plan by stipulation to this effect. Others have not bound their members to the Plan. In this latter category, an employer is bound to the Plan only if he makes an individual stipulation to this effect (Green Book, Art. III, Sec. 7, p. 10). Many contractors, both members and non-members of the associations affiliated with PCEA, have signed such stipulations.

Insofar as AGC is concerned, it has a very large contingent of non-union contractor members. AGC was one of the original signatories to the Plan in 1948, but withdrew as a signatory in September, 1969. AGC was never empowered to stipulate its members to the Plan. Before AGC's withdrawal, many of its members signed stipulations to be bound to the Plan. Despite the formal withdrawal from the Plan by AGC, many of its members remain individually stipulated to the Plan. Many of these are also members of the associations which currently comprise the general contractor segment of the PCEA.

Of the thirteen organizations which comprise the PCEA, eight are national associations of mechanical and specialty contractors, and five are national associations of contractors who employ primarily members of the basic trades—bricklayers (including masons), carpenters (including millwrights), iron workers, laborers, operating engineers and teamsters. These latter five organizations are the National Constructors Association (NCA), and four associations which comprise the National Council of Erectors and Riggers (NCER) to wit, National Erector Association (NEA); Crane and Rigging Division of Heavy Specialized Carriers Conference; National Association of Reinforcing Steel Contractors; and National Association of Miscellaneous, Ornamental and Architectural Products Contractors.

The NCA consists of thirty-four of the largest general contractors in the world (e.g., Bechtel Corp.; Day & Zimmerman, Inc.; Dravo Corp., Engineering Construction Division; Ebasco Services, Inc.; Kaiser Engineers; Koppers Co., Inc., Engineering & Construction Division; Stone & Webster Engineering Corp.). Many of the members of the NCA were formerly members of AGC before AGC withdrew from the Plan and remain members of AGC. NCA members specialize in heavy industrial building construction (e.g., oil refineries, steel mills), although some of its members (e.g., Dravo Corp.) are also engaged in the so-called "heavy" branch of the industry.[8] More than any

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In addition, AGC members subcontract a large portion of their contracts to subcontractors who are members of the eight national mechanical and specialty associations included in the PCEA. These facts show that a very large portion of the annual construction volume referred to in the motion of AGC (p. 2) is performed by employers who are stipulated to the current Plan. And, it should be noted, that, insofar as the volume of *employment* is concerned, the bulk of organized employees in the industry are employed by the contractors represented by the PCEA.

[8] The term "heavy" construction is used by some in the industry to refer to the construction of such projects as dams, levees and bridges. The former director of labor relations of Dravo Corp., G. T. Leonard, is a current member of the Joint Board.

other group of employers, many NCA members are general contractors in the traditional sense of the term, i.e., contract directly with the owner of the project, assume responsibility for the entire job and perform all or most of the construction work with its own employees. Indeed, NCA members are usually responsible to the owner for the design and engineering, as well as the construction, of the projects.[9] NCA members employ approximately fourteen of the trades, including all of the basic trades in substantial numbers.[10] Thus, NCA probably has a more broadly based outlook as to all phases of the building and construction industry—including questions involving inter-union jurisdiction—than any other employer group.

The four associations constituting the National Council of Erectors and Riggers perform industrial, commercial and commercial-residential building work as well as so-called "heavy" work, and primarily employ members of the six basic trades. One of these associations, the NEA, is composed of 130 contractors among which are the biggest steel erectors in the world (e.g., United States Steel Corp., American Bridge Division; Bethlehem Steel Corp.; Kaiser Steel Fabricating Division; The Ingalls Iron Works Co., Construction Division). The work engaged in by such members includes building and marine steel erection and the building of overpasses and bridges on the nation's highway systems. NEA members employ iron workers, operating engineers and laborers; indeed, approximately 40 percent of all organized iron workers in the country are employed by NEA members. Many NEA members were

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[9] Thus, Laborers' Union's attempt to designate NCA contractors as specialty contractors is contradicted by its own statement (brief, p. 20) that " 'specialty contractors' invariably perform work pursuant to a subcontract received from a general contractor." As indicated above, NCA members contract directly with the owners of the projects.

[10] The reference in Laborers' Union's brief (p. 26 n. 35) to 1942-1952 average annual employment figures is, of course, completely outdated.

members of AGC before AGC withdrew from the Plan and remain members of AGC.[11]

Operation of the Plan Regardless of Whether the Particular Employer Affected By the Dispute Is Bound Thereto

As correctly noted by the court below (A. 370 n. 10), the machinery of the Plan is operative regardless of whether or not the particular employer affected by the jurisdictional dispute (i.e., the employer assigning the disputed work) has agreed to be bound to the Plan or to exercise his rights of participation which the Plan affords.[12] Thus, the original Plan provided:

> "It shall be the duty of the Joint Board to consider and decide all cases of jurisdictional disputes in the building and construction industry, which are referred to it *by any of the international unions involved in the dispute; or* an employer directly affected by the dispute on the work in which he is engaged; *or* by a participating organization representing such employer." (Emphasis added.)

Similarly, Article II, Section 4 of the current Plan provides:

> "It shall be the duty of the Joint Board to consider and decide cases of jurisdictional disputes in the building and construction industry, which disputes are referred to it by *any of the International Unions involved in the dispute,* or an employer directly affected by the dispute on the work in which he is engaged or

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[11] The factual information in note 7 *supra* and in the three foregoing paragraphs has been supplied by the Chairman of the Joint Board and the Secretary of the PCEA.

[12] The references in the opposing briefs to the Plan's provisions regarding the binding to the Plan of stipulated contractors have no bearing on the Joint Board's jurisdiction or on the legal issue presented in this case. Rather, they simply make it clear that, as a matter of contract-arbitration law, a non-stipulated employer is not subject to the requirements imposed by the Plan and cannot be judicially compelled to abide by decisions rendered thereunder. See also *supra* n. 7.

by a participating organization representing such employer." (Emphasis added.) [18]

That the Joint Board has asserted jurisdiction and rendered decisions regardless of whether or not affected employers have agreed to be bound to the Plan is reflected in many decisions which have been rendered by the NLRB since 1948 under Section 10(k) of the Act indicating that the National Joint Board had accepted jurisdiction under the Plan notwithstanding the lack of stipulation by the contractor. E.g. *United Brotherhood of Carpenters, etc., Local 581 (Ora Collard)*, 98 NLRB 346, 348-349 (1952); *Local 173, Wood, Wire and Metal Lathers' International Union AFL-CIO (Newark and Essex Plastering Co.)*, 121 NLRB 1094, 1103-1104 (1958); *Millwrights Local 1102, United Brotherhood of Carpenters (General Riggers and Erectors, Inc.)*, 127 NLRB 26, 29 (1960); *International Union of Operating Engineers, Local 66 (Frank P. Badolato & Son)*, 135 NLRB 1392, 1395-1396 (1962); *Carpenters District Council of St. Louis and Bricklayers Local No. 1 (Gorman Bricklaying Co.)*, 146 NLRB 989, 992 n. 6 (1964).

Obligations Imposed Upon Affiliated Building and Construction Trades Unions

1. As noted *supra* at 6, since 1955, the Constitution of the Department has made the Plan binding on all affili-

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[18] Laborers' Union's brief (p. 10 n. 9) omits from its quotation of this provision the phrase "any of the International Unions involved in the dispute, or".

The Regulations are consistent with the above quoted language from the Plan. They provide (p. 10), "When the Joint Board has received a protest of work assignment from *an International Union* or a request for a job decision from a contractor, it shall proceed to make a job decision as outlined below." (Emphasis added.) The quotations in the *amici* briefs of Laborers' Union (p. 12) and of AGC, etc. (p. 11 n. 7) of the provision in the Blue Book specifying those to whom the regulations apply omits the subsequent paragraph of that provision (Blue Book, p. 2; A. 344): "(b) All unions affiliated with the Building and Construction Trades Department, AFL-CIO, in the building and construction industry." That provision makes the procedures in the regulations applicable to the unions on an independent basis.

ated unions of the Department;[14] and since 1957, the Constitution has required that all jurisdictional disputes between affiliated National and International Unions or their affiliated Local Unions shall be adjusted according to the Plan.[15]

2. Work Stoppages and Picketing Prohibited—Fundamental to the operations of the Plan are the provisions dealing with work stoppages and picketing. The Plan states: "Pending a decision by the [Joint] Board or such settlement as may be arrived at through the office of the Chairman of the Joint Board, there shall be no stoppage of work rising out of any jurisdictional dispute. . . . Members of organization affiliated with the Building and Construction Trades Department shall continue to work on the basis of their original assignment." (Green Book, Art. VI, Sec. 1, pp. 12-13.)

The Plan goes on to provide (Sec. 2):

> "Recognizing it is in the best interests of the parties to this Agreement, the Building and Construction Trades Department, on behalf of itself and the General Presidents of each of the affiliated National and International Unions, reaffirms their desire to eliminate work stoppages, slowdowns and other impediments to job progress in an attempt to comply with the provisions of the Plan prohibiting jurisdictional strikes and agree to enforce these provisions by direction and action of the respective International Offices. Should work stoppages persist for more than forty-eight (48) hours following notification by the National Joint

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[14] Thus, with reference to the statements in the brief, *amicus curiae*, of Laborers' Union (p. 22), while there were withdrawals from the Plan by certain affiliated unions prior to 1955, since that time all affiliated unions have been bound to the Plan. This is not to say that there has been uniform compliance by all affiliates with each of the specific obligations imposed by the Plan.

[15] The Regulations similarly provide: "When a contractor has made a specific work assignment, all unions shall remain at work and process any complaint over a jurisdictional dispute in accordance with the procedures herein established by the Joint Board." (Blue Book, p. 6.)

Board (Saturdays, Sundays and legal holidays excluded), the parties hereto agree that the contractor shall be free to pursue methods of settlement other than the Joint Board established hereunder."

The Regulations specifically provide:

"When the Joint Board has received from a contractor or from an International Union notice of a jurisdictional work stoppage, the Chairman of the Joint Board shall notify the General President of the Union (or Unions) engaged in the work stoppage and shall instruct the General President to direct the members on strike to return to work and to perform their assigned work, and to keep work in continuous operation pending a settlement of the dispute." (Blue Book, p. 9.)

When an International Union requests a job decision and its members remain off the job or hold up disputed work, processing for Joint Board decisions does not start until the International Union has returned its members to work. When a union remains off the job or establishes a picket line forcing a contractor to refer a jurisdictional dispute, and the Joint Board decides that the work in dispute is properly the work of the striking or picketing trade, the effective date of the Joint Board decision is delayed by the number of work days the work stoppage or picket line was in effect. During the delay period, the disputed work proceeds in accordance with the contractor's original assignment. (Blue Book, p. 12.)

3. The Plan provides:

"It shall be a violation of this agreement for any *Local Union, International Union,* employer or employers' association to enter into any agreement, resolution or stipulation that attempts to establish any jurisdiction which deviates from the spirit and intent of the Agreement and Procedural Rules of the Joint Board Plan.

"When the Joint Board receives a protest of an alleged violation from an international union, an em-

ployer or an employers' association, it shall proceed to make a decision and to determine the action which should be taken to correct the violation consistent with the applicable legal obligations of the parties.

"Failure by the Parties to accede to the decision of the Joint Board under this paragraph shall be treated in the same manner as noncompliance with a job decision." (Emphasis added.) (Green Book, Art. III, Sec. 9, p. 11.)

4. The Plan provides:

"The Building and Construction Trades Department and all International Unions affiliated with the Building and Construction Trades Department shall, in accordance with their constitutional powers, request each of the Building and Construction Trades Councils, District Councils and Local Unions, respectively:

"(a) To secure written assent or stipulation to the 'Plan for Settling Jurisdictional Disputes Nationally and Locally' by all Employers in signed agreement with said International Union, Council and/or Local Union except for such employers who are stipulated to the Plan by the action of the employers' association of which they are members; or

"(b) To proceed at earliest opportunity to negotiate National Joint Board stipulation into all agreements with each employer whose employees are represented by such District Council or Local Union." (Green Book, Art. V, Sec. 1, p. 12.)

5. The Regulations provide that, "The affected *Unions* and contractors shall promptly comply with each job decision of the Joint Board." (Emphasis added.) (Blue Book, p. 14.) This includes the obligation by Unions to disclaim work which employers—stipulated or non-stipulated—offer to employees contrary to a decision under the Plan.

The Joint Board, Appeals Board and Hearings Panels

The Joint Board—The brief, *amicus curiae,* of the Laborers' Union (p. 27) contends "that while the Joint Board purports to be structured to provide equal represen-

tation for all segments of the industry, there are, in fact, no employers on the Joint Board whose voice or vote represents the interests of the general contractor and his laborer-employees."

Contrary to the position of Laborers, the National Labor Relations Board has not taken the position that the membership of the Joint Board is unrepresentative of the general contracting branch of the industry, as is apparent from the fact that it defers to the Plan and does not conduct a Section 10(k) hearing in cases where the affected employer is stipulated to the Plan. It is the same Joint Board which issues decisions in cases where such employer is not stipulated. If the machinery is adequately representative in the former, it is similarly representative in cases where the employer is not stipulated.

Moreover, Laborers' statement that no employers on the Joint Board represent "the interests of the general contractor *and his laborer-employees*" (emphasis added) forgets the fact that the interests of these employees, and employees from all of the basic trades, are represented by the *unions* through their labor representatives on the Joint Board.

The Joint Board consists of an impartial chairman,[16] four regular and four alternate labor members appointed by the Executive Council of the Department, and four regular and four alternate employer members who are representatives of and selected by the Participating Contractors Employers' Associations. As far as the labor members are concerned, the Plan requires that two each of the regulars and the alternates must be appointed from among the basic trades (with a similar distribution to be appoint-

[16] The Chairman is selected by the Joint Negotiating Committee which is the bargaining group delegated by the signatories to the Plan and which meets on a regular basis to review and draft proposed revisions to the Plan and to approve or reject regulations promulgated by the Joint Board and Appeals Board. (Green Book, Art. II, Secs. 1, 5.)

ed from among the specialty trades). (Green Book, Art. II, Sec. 1, pp. 1-2.) Employees in the basic trades are represented on the current Joint Board by officials of Unions which include the Operating Engineers, Bricklayers and Plasterers (who represent cement masons).

Even insofar as the representation on the Joint Board of the interests of general contractors are concerned, Laborers' brief is incorrect. Half of the employer members on the Joint Board are from the NCA and the NCER (see discussion *supra* at 10-12).

When a dispute is submitted to the Joint Board by an International Union, notice is given by the Joint Board to the affected employer, and he is requested to furnish a full description of the disputed work. (Blue Book, p. 12.) International Unions whose affiliates are engaged in the dispute are provided an opportunity to state in writing to the Joint Board the basis for their respective claims. (Blue Book, pp. 10, 11.) No member of the Joint Board may participate in any case where the trade union or employer of which he is an officer or representative is involved in the dispute. (Green Book, Art. II, Sec. 1, pp. 1-2.) *Any* affiliated International Union and any stipulated employer national association, which does not have direct representation on the Joint Board hearing a specific case, may be represented and participate in the Joint Board's discussion of such case. (Green Book, Art. III, Sec. 1(e), p. 7; Blue Book, p. 17.)

Any affected International Union or contractor has the right to a reconsideration of a Joint Board decision by the submission of additional written evidence or by oral hearing, provided that the decision has been accepted and put into effect by the affected parties and remains in continuous effect until reconsideration is had. The Unions and, in cases where the request for reconsideration is made by an affected employer, the employer, are given the opportunity to present written evidence or be heard and present wit-

nesses. A request for reconsideration must be submitted within ten working days after the original decision. (Blue Book, pp. 14-15.)

The Joint Board may, at its discretion, hold oral hearings on repetitive disputes for the purpose of rendering a decision applying in a locality as opposed to the usual decision limited to the specific job. The Joint Board will consider cases for the application of this special procedure made by an International Union, a signatory national association or a stipulated local contractors association. (Blue Book, pp. 18-19.)

In addition to the functions described above, the Joint Board may at its discretion and after a conference between contesting unions refer a repetitive dispute to the Impartial Umpire for mediation and the establishment of a Hearings Panel and a national decision. (Green Book, Art. III, Sec. 5, p. 9.)

The Appeals Board—The Appeals Board consists of an Impartial Umpire appointed by the Joint Negotiating Committee, two regular and two alternate labor members appointed by the Executive Council of the Department who must be either General Presidents of affiliated International Unions or elected general officers of such Unions designated by such Presidents, and two regular and two alternate employer members appointed by the Participating Contractors Employers Associations. As with the Joint Board, one-half of the labor members of the Appeals Board must be from the basic trades and the other half from the specialty trades. (Green Book, Art. II, Sec. 2, p. 4.)

The functions of the Appeals Board lie in two areas: to decide appeals from decisions of the Joint Board and to consider requests for the referral of disputes to a hearings panel for decision on a national basis.

With respect to the first function, the Plan provides in pertinent part: "The Appeals Board is empowered to

review and decide any appeal from a decision or ruling of the National Joint Board . . . and such decision of the Appeals Board shall be final. The jurisdiction of the Appeals Board shall be discretionary. . . .'' (Green Book, Art. II, Sec. 5, p. 6.) A request to consider an appeal may be filed with the Appeals Board by (a) any of the International Unions involved in the dispute; (b) employers involved or directly affected by the dispute; or (c) national contractor associations with members involved or directly affected by the dispute. (Blue Book, p. 26.) A request to consider an appeal must be filed no later than three working days after the Joint Board's decision. The request must include a statement of the reasons for the appeal. (Blue Book, p. 26.) The request to consider an appeal from decision of the National Joint Board constitutes a stay of such decision. (Blue Book, p. 27.)

In exercising its discretion as to whether or not to accept an appeal, the Appeals Board gives consideration to such factors as the significance of the dispute, the frequency with which such disputes have arisen, the contribution a decision may make to the resolution of disputes and the improvement of relations. (Blue Book, p. 28.) The Appeals Board must ''promptly'' review and decide any request to consider appeals and, where it has decided to accept an appeal, ''promptly'' set a date for the consideration of the case. If the Appeals Board rejects the consideration of the appeal, the decision of the Joint Board shall promptly be placed into effect. The decision of the Appeals Board must be complied with at once. (Blue Book, pp. 27-29.)

With respect to the second function, the Plan provides: ''When a dispute is filed with the Appeals Board by a National or International Union, with a specific request for a decision on a national basis which would become part of the record, the Board shall review the request, and if the Board finds it is an issue not already determined on a national basis by a decision or agreement of record, it

shall refer the issue to the Impartial Umpire who, shall call a conference of the General Presidents of the Unions involved for the purpose of determining whether or not a national agreement is possible. If an agreement is concluded and properly signed by the contesting parties and attested by the Impartial Umpire, the terms and provisions of the agreement shall remain in effect as per the provisions of the Constitution of the Department. In the event that the dispute cannot be settled by agreement or is not settled by agreement at the end of six months, the Impartial Umpire shall docket the case for hearing and decision by a hearings panel. . . .'' (Green Book, Art. III, Sec. 2, p. 8.)

Hearings Panels—Such *ad hoc* panels are composed of the Impartial Umpire of the Appeals Board, two disinterested General Presidents of affiliated International Unions appointed by the Executive Council of the Department, and two disinterested contractor representatives appointed by the Participating Contractors Employers' Associations. (Green Book, Art. III, Sec. 4, p. 9.)

When a dispute reaches a hearings panel from either the Joint Board or Appeals Board, as described above, the Impartial Umpire notifies all General Presidents of affiliated International Unions and the National Participating Employers Associations, stating the controversy to be considered and that all interested persons will be permitted to intervene. Briefs are submitted and exchanged by all parties to the dispute. (Green Book, Art. III, Sec. 3, pp. 8-9.) The hearings panel must consider all pertinent evidence and render a decision if possible within ten days after the conclusion of the hearing. Decisions of the hearings panel are not appealable to the Appeals Board and must immediately be accepted and complied with by all parties to the Plan. (Green Book, Art. III, Sec. 7, p. 9.) In considering such disputes the hearings panel must ascertain whether and to what extent the disputed work opera-

tions are governed by a decision or agreement of record and must make national jurisdictional determinations of work operations not governed by decisions or agreements of record. (Green Book, Art. III, Sec. 8(d), p. 10.)

Standards For Work Jurisdiction Under the Plan

The standards established by the Plan for determining which of the contesting groups of employees has jurisdiction over particular work must be understood as much for their value in enabling affiliated unions to refrain from claiming work over which they do not have jurisdiction, and thus avoid jurisdictional disputes, as for the governing standards which will be applied by decisional tribunals under the Plan in the resolution of such disputes.

Foremost among these standards are (1) "decisions of record" issued pursuant to the Plan or predecessor jurisdictional disputes machinery in the building and construction industry, and which have resolved disputes on a nationally applicable basis; and (2) jurisdictional agreements entered into between affiliated International Unions and been approved by the Building and Construction Trades Department, and which are also applicable on a national basis. These decisions and agreements are set out in the Green Book and are indexed for ready reference. The Plan provides: "When a dispute is filed, the Joint Board shall in all cases first investigate the claims of the disputing parties to determine whether or not a disposition thereof has been made by a previous decision of record or by recorded agreement between the parties to this dispute and issue a ruling as to the decision or agreement governing in the case, and determining which one of the parties to the dispute has a rightful claim to the work under the agreement or decision of record." (Green Book, Art. III, Sec. 1(a), pp. 6-7.)

It should be emphasized that the Plan encourages the

Department's affiliated Unions to execute new nationally applicable agreements of record or, in the absence of agreement, to submit disputes for new nationally applicable decisions of record by Hearings Panels.[17] See, e.g., the provisions in Article III, Section 2 of the Plan, quoted *supra* at 20-21 in connection with the second function of the Appeals Board.[18]

In the absence of a decision or agreement of record, the Plan provides: "If the Joint Board finds that the dispute is not covered by a decision or agreement of record, it shall render a job decision, in which the Board should consider the established trade practice and prevailing practice in the locality" (Green Book, Art. III, Sec. 1(b), p. 7). The Plan goes on to provide that, "Because efficiency, cost and good management are essential to the well-being of the industry, the Joint Board should not ignore the interests

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[17] Thus, for example, on August 24, 1966, a hearings panel decision was rendered resolving an extremely repetitive dispute between Carpenters and Lathers over the installation of ceiling systems. The Panel included John T. Dunlop, then-Impartial Umpire under the Plan. Among participants in the proceeding were AGC, the National Acoustical Contractors Association, the Gypsum Drywall Contractors, as well as the unions to the dispute. The decision was unsuccessfully challenged in *Lathers v. Dunlop*, Civil Action No. 1221-66 (D. D.C. 1967), affirmed per curiam 382 F. 2d 176 (D. C. Cir. 1967), cert. denied 389 U.S. 971.

[18] A recent development further shows the continuing flexibility afforded by the Plan in its effort to eliminate the disruption of industrial peace on account of jurisdictional disputes. On February 14, 1971, the Department and the National Constructors Association—one of the Participating Contractors Employers' Associations—entered into a "Jurisdictional Agreement." Under this Agreement, jurisdictional work stoppages and picketing are prohibited. Violations of this Agreement can subject the Department's affiliated Unions to financial penalties. Employer parties to this Agreement agree to make work assignments in accordance with the Regulations under the Plan. Assignments which are "reversed" by a decision under the Plan and which subsequently are independently determined to have been made unreasonably can subject employers to financial penalties. The Agreement provides for the future voluntary participation in the Agreement by other employer associations whose members stipulate to the Plan and by individual employers signing a letter of assent to be bound by the Agreement.

of the consumer in settling jurisdictional disputes." (Green Book, Art. III, Sec. 1(f), p. 8).[19]

ACCOMPLISHMENTS OF THE PLAN[20]

The Plan remains the primary method by which work assignment disputes in the building and construction industry are determined and resolved. Because of the generally short duration of construction jobs and the necessity to complete various phases on a schedule, time is of the essence and a critical factor in the settling of work assignment disputes in this industry. The Joint Board meets weekly to decide cases. Disputes referred to the Joint Board by Tuesday of a given week are decided at the weekly Thursday meeting of the following week. There is no backlog of waiting cases. (Information obtained from the Chairman of the Joint Board.)[21] "Thus the Joint Board Plan meets the requirement for prompt action." *Strand, supra* n. 2, p. 103.[22]

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[19] Laborers' Union reference (brief, p. 24) to this criterion as "rhetorical gloss" is unwarranted and inconsistent with the Secretary of Labor's recognition (*supra* n. 6) that the Plan "specifically considers consumer interests along with the interests of workers and employers."

It may be noted that the opinion by the court below set forth the Joint Board's clarified decision in the dispute between the Plasterers and Tile-Setters containing a partial award to Tile Setters "in the interest of efficient job operation." A. 355 n. 6.

[20] *Strand, supra* n. 2, p. 99, observed in 1961: "Considered in light of the previous attempts to establish a method for the settlement of jurisdictional disputes, the Joint Board's accomplishments have been astounding."

[21] Insofar as the Plan's Appeals Board is concerned, its decision whether to consider an appeal is made within one to two weeks from the filing of the request and the determination of an appeal is made within another two to three weeks. (Information obtained from the Impartial Umpire of the Appeals Board.) The Appeals Board considers requests for appeals from approximately 19 percent of the Joint Board's decisions, and grants approximately 35 percent of such requests. A substantial number of the appeals granted are resolved by the disputing unions prior to decision by the Appeals Board. (Reports of the Appeals Board, February 1968 - February 1971.)

[22] By contrast, for the fiscal year 1968, it required a total of 172.5

In the absence of the Plan, the resulting expansion of the NLRB's jurisdictional dispute case load would substantially increase the NLRB's current backlog and postpone its determination of disputes even more. The vast preponderance of disputes which are resolved under the Plan and never become the subject of charges before the NLRB, or a Section 10(k) proceeding, is indicative of the significant accomplishments of the Plan not only in the eyes of labor but of management.

Even more indicative of the stability being promoted by the Plan are the thousands of dispute-free work assignments which are being made every day on building and construction jobs, following pre-job conferences among affected groups, by reference to the jurisdictional precedents under the Plan. As John T. Dunlop wrote in a letter to participants in the Plan, upon his resignation as Chairman of the Joint Board in 1957, "The course of a dispute in almost all job decisions, except those on novel issues, are largely predictable by lines of precedent." 40 Labor Relations Reference Manual (LRRM) 18, 21. Stipulated and non-stipulated employers alike are being guided by and are applying these precedents on a practical basis and are quiet beneficiaries of the industrial peace which they afford.[28] *Strand, supra* n. 2, p. 101 referred to the fact that

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median days from the filing of the unfair labor practice charge to the NLRB's 10(k) determination. For the fiscal year 1969, it required a total of 206.3 median days. For the fiscal year 1970, it required a total of 230.0 median days. (Information obtained from the Office of the Executive Secretary of the NLRB.)

[28] The AGC has published a book entitled "National Jurisdictional Agreements Not Printed In the Green Book" (revised September, 1963) (154 pp.) which continues to be used by AGC members throughout the country in making work assignments. The "Foreword" of this book states:

> "A basic principle of the National Joint Board Plan is that contractors who subscribe to the Plan agree to make their work assignments in accordance with certain established procedures.
>
> "The Green Book, containing the decisions and agreements of record, constitutes the official guide for work assignments. Such

"gradually, the decisions and policies of the Joint Board caused the industry to begin to rely more on precedent and compromise and less upon economic power."

Strand, *supra* n. 2, p. 101, referred to the above quoted letter by John T. Dunlop regarding the precedential values of the Plan:

> "Dunlop also cited as accomplishments the recognition that: (1) the Joint Board Plan allows jurisdiction to be determined in advance of bidding with uniform application among contractors; (2) the plan seeks to regulate competition among unions in the industry by introducing jurisdictional stability; and (3) national jurisdictional agreements are '. . . the very best way to resolve these questions.' "

DIFFICULTIES CAUSED BY NLRB INTERPRETATION OF SECTION 10(k)

The private machinery in this area, like other decisional institutions in our legal process, finds its greatest appeal in the stability it can afford. By establishing criteria for decisions, and determining cases within a uniform framework, the machinery enables unions to be able to predict the outcome of disputes and to order their objectives and programs accordingly. The results are a reduction of the number of work stoppages for such objectives, the resolution of disputes before they reach the level of formal determination, private or governmental, the permanent resolution of disputes following private determination, and greater industrial peace in general. All this is disrupted

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agreements of record have been attested by the Board and approved by the Building and Construction Trades Department.

"In addition, there are numerous other national agreements between international unions which have not yet been approved by the Department but some of which are binding on employers under the Joint Board's rules of procedure.

"In order that our membership may be as fully informed as possible regarding these agreements, the AGC, with the permission of the Chairman of the National Joint Board, has compiled these agreements in the following pages."

when the NLRB can override the private determination with a contrary determination of its own.[24]

The NLRB's interpretation of Section 10(k) encourages unions affiliated with the Department to avoid their contractual obligations under the Plan—obligations which apply regardless of whether or not an affected employer is stipulated to the Plan. These obligations include the requirement to refer jurisdictional disputes for resolution under the Plan; to refrain from engaging in a work stoppage or picketing pending such resolution; and to comply with the resolution under the Plan including a disclaimer of the work by the non-prevailing union. A union which knows, from prior decisions of the NLRB, that the NLRB will reject the private determination, when the employer is not bound to the Plan, can (1) fail to refer a dispute for determination by the private machinery and, instead, engage in a work stoppage and/or picketing, (2) subsequent to an adverse determination by the private machinery, refuse to comply with such determination and con-

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[24] The opposing briefs refer to a statement in a brief by Professor Cox (on behalf of the Joint Board) submitted to the NLRB in 1957 in *Lathers Local Union No. 2 (Acoustical Contractors Assn. of Cleveland)* 119 NLRB 1345 (1958). That case presented the question whether the Act permitted the initiation of a 8(b)(4) (D) complaint proceeding where the NLRB had previously abstained from conducting a hearing and making a determination under Section 10(k) because of the existence of an agreed upon method of voluntary adjustment. The affected employer in that case was bound to the Plan so the NLRB's interpretation of Section 10(k), at issue in the instant case, was not at issue there.

Moreover, as noted in the NLRB's brief in the instant case (p. 22 n. 14), the statement from Professor Cox's brief was made in the context of the Joint Board's concern at that time that the NLRB should abandon its pre-CBS practice of accepting the employer's work assignment unless the striking union was entitled to the work under an outstanding NLRB certification or collective bargaining agreement.

Therefore, the statement in Professor Cox's brief offers no more authoritative support for petitioners' position in the instant case than the cases cited in the dissenting opinion below (A. 387 n.2) but regarded by Judge Leventhal as not in point "for the reason that they are not cases where the Board's interpretation was challenged or where disposition turned on the resolution of this issue (A. 372 n.11)."

tinue its work stoppage and/or picketing, hoping to have a contrary determination rendered by the NLRB, or (3) prevail upon a friendly employer to continue an assignment which is contrary to such determination. In the third situation, the employer's non-commitment to the private machinery may have been preplanned to protect the union in the event of the anticipated adverse determination by the private machinery.

It may be noted that although there is a twenty-three year history of employer participation in the Plan there is no guarantee that this condition will continue. If such participation ceases, procedures authorized by the Constitution of the Department (Article X) limited to unions may provide the only private machinery to deal with the numerous jurisdictional disputes in this industry. The effectiveness of any such machinery will be severely limited by the current interpretation of the NLRB of the term "parties to such dispute" in Section 10(k) of the Act.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

LOUIS SHERMAN,
ELIHU I. LEIFER,
Counsel for Building and Construction Trades Department, AFL-CIO, Amicus Curiae

August 1971

APPENDICES

APPENDIX A

MEMBERS OF THE SIGNATORIES TO THE CURRENT PLAN FOR SETTLING JURISDICTIONAL DISPUTES NATIONALLY AND LOCALLY IN THE BUILDING AND CONSTRUCTION INDUSTRY

I. Participating Contractors Employers' Associations

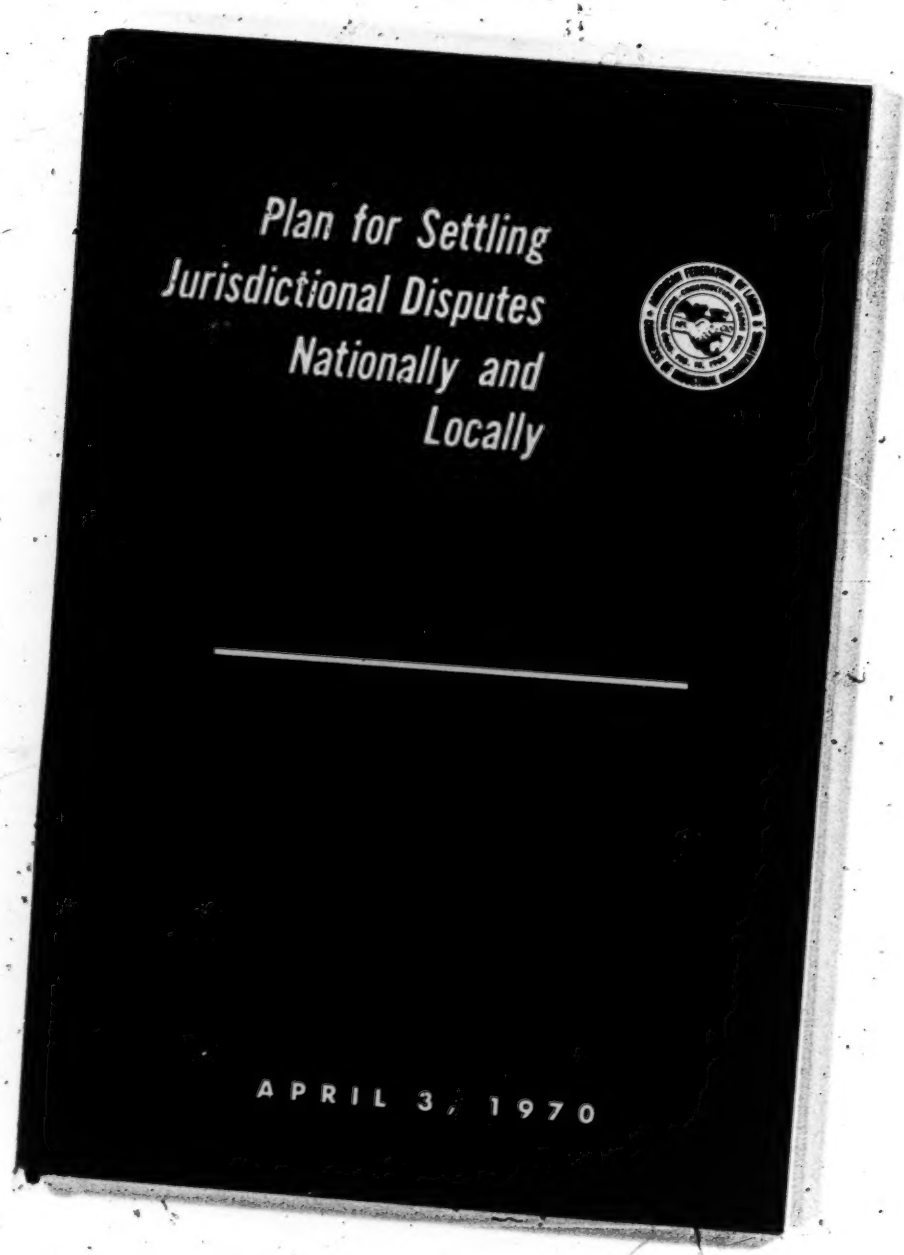
1. National Constructors Association
2. National Electrical Contractors Association
3. Mechanical Contractors Association of America, Inc.
4. National Association of Reinforcing Steel Contractors
5. National Association of Miscellaneous, Ornamental and Architectural Products Contractors
6. National Erector Association
7. Crane and Rigging Division of Heavy Specialized Carriers Conference
8. Plumbing-Heating-Cooling Contractors Association
9. Painting and Decorating Contractors of America
10. Sheet Metal and Air Conditioning Contractors National Association
11. Insulation Distributor-Contractors National Association
12. Gypsum Drywall Contractors International
13. Glazing Contractors Labor Jurisdiction Committee

II. Building and Construction Trades Department, AFL-CIO

1. International Association of Heat and Frost Insulators and Asbestos Workers

2. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
3. Bricklayers, Masons and Plasterers' International Union of America
4. United Brotherhood of Carpenters and Joiners of America
5. International Brotherhood of Electrical Workers
6. International Union of Elevator Constructors
7. International Union of Operating Engineers
8. Granite Cutters' International Association of America
9. International Association of Bridge, Structural and Ornamental Iron Workers
10. Laborers' International Union of North America
11. Wood, Wire and Metal Lathers' International Union
12. International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile Helpers and Finishers, Marble Setters Helpers, Marble Mosaic and Terrazzo Workers Helpers
13. International Brotherhood of Painters and Allied Trades
14. Operative Plasterers and Cement Masons International Association
15. United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association
16. Sheet Metal Workers' International Association
17. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

APPENDIX B


Plan for Settling
Jurisdictional Disputes
Nationally and
Locally
APRIL 3, 1970

PLAN FOR SETTLING JURISDICTIONAL DISPUTES NATIONALLY AND LOCALLY

In consideration of the mutual promises and covenants herein contained, it is agreed by and between the parties hereto as follows:

ARTICLE I

Sec. 1. *Effective Date.*—This agreement, as amended, shall take effect on April 3, 1970, and shall remain in force and effect until March 31, 1971, and shall continue in effect for each year thereafter unless terminated as provided for herein. Changes or amendments to this agreement may be made as provided for herein.

Sec. 2. Any party signatory to this agreement desiring to change or terminate this agreement shall notify the other party in writing at least ninety (90) days prior to the 31st day of March of any year subsequent to 1971. When notice for change is given, the nature of the changes desired must be specified in the notice. This agreement shall be subject to change at any time by mutual consent of the parties hereto. Any changes agreed upon shall be reduced to writing and signed by the parties hereto, the same as this agreement.

ARTICLE II

Sec. 1. *Joint Board.*—There shall be established a National Joint Board for the Settlement of Jurisdictional Disputes in the building and construction industry.

This Board shall consist of an impartial chairman, four regular and four alternate Labor Members appointed by the Executive Council of the Department. Two of each shall be appointed from among the basic trades and two each shall be ap-

pointed from among the specialty trades, and four regular and four alternate employer members, who shall be representatives of and selected by the Participating Contractors Employers' Associations.

It is understood such employer representatives shall consist solely of contractor members, officers of member contracting firms or qualified association staff members who have had experience and are actively engaged in the building and construction industry.

The regular and alternate members appointed to the Joint Board by the Executive Council of the Building and Construction Trades Department and those appointed by the Participating Contractors Employers' Associations shall each be selected from among individuals representing primary experience and knowledge in each of the following general categories in the industry: (1) industrial, (2) commercial, (3) heavy and highway, and (4) residential.

No regular or alternate member of the Joint Board shall participate in any case where the trade union or company of which he is an officer or representative is a party to the dispute. In the event that both a regular member and his alternate are disqualified from participation in a case by reason of the limitation expressed in the preceding sentence, the executive head or other designated representative of the Department or the Participating Contractors Employers' Associations shall designate an appropriate substitute member from the eligible group to participate in the decision of the case.

The full-time officers of the Department shall be available for advice and consultation but they

shall not be eligible for appointment to the Joint Board.

There shall be no proxy votes.

The Labor Members of the Board shall hold office for one (1) year and shall be appointed by the Executive Council annually at the first quarterly meeting of each year.

The joint negotiating committees representing the Building and Construction Trades Department and the Participating Contractors Employers' Associations shall have the duty of selecting the Chairman of the National Joint Board and the Impartial Umpire of the hearings panel and Appeals Board.

The Chairman of the National Joint Board shall be bonded and made responsible for disbursement of the Board's funds, shall keep the books of the Board and submit to the parties to the agreement a quarterly financial statement; shall provide for an annual audit of the books by a certified public accountant and shall prepare annually a proposed budget of the necessary expenses of the Board for the following twelve (12) months and submit same to the joint negotiating committee for approval. The total amount of the budget, when approved, shall be subscribed annually in advance 50 per cent by the Building and Construction Trades Department, AFL-CIO, and 50 per cent by the participating national associations of employers signatory to this agreement. All expenditures shall be within the approved budget.

In negotiating national agreements between international unions, consultation with the appropriate management groups on the making of agreements between international unions is desirable and should be carried on.

National agreements entered into and properly

signed by disputing international unions, other than those provided for in Article III, Section 2, shall be filed with the National Joint Board and attested by the Chairman.

Joint Board Rules and Regulations.—The Chairman and Joint Board shall have the authority to establish such procedural regulations and administrative practices as may be required for the effective administration of this agreement, with the approval of the Joint Negotiating Committee, provided such regulations and practices are consistent with the expressed terms of this agreement.

The Joint Negotiating Committee shall have the power to revise the procedural regulations and administrative practices of the Joint Board.

Sec. 2. *Appeals Board.*—There shall also be established an Appeals Board consisting of an Impartial Umpire appointed by the Joint Negotiating Committee, two regular and two alternate labor members appointed by the Executive Council of the Department from the General Presidents of the national and international unions affiliated with the Department, or elected general officers of national or international unions designated by their respective General Presidents and two regular and two alternate employer members appointed by the Participating Contractors Employers' Associations. It is understood such employer representatives shall consist solely of contractor members, officers of member contracting firms or qualified association staff members who have had experience and are actively engaged in the building and construction industry. The Executive Council shall select one regular and one alternate Labor Member from the basic trades and one regular and one alternate Labor Member from the specialty trades. No regu-

lar or alternate member of the Appeals Board shall participate in any appeal where the trade union or company of which he is an officer or representative is a party to the dispute. In the event that both a regular member and his alternate are disqualified from participation in an appeal by reason of the limitation expressed in the preceding sentence, the executive head or other designated representative of the Department or the Participating Contractors Employers' Associations shall designate an appropriate substitute member from the eligible group to participate in the decision of the appeal.

The Members of the Appeals Board shall hold office for one (1) year and shall be appointed by the designated appointing agency annually except that where a vacancy occurs during an unexpired term of office the appointing power can be exercised at the time such vacancy occurs.

The commitments of the Department and the national participating employers association groups with respect to the subscription of funds of the National Joint Board shall also apply equally to the Appeals Board. The expenses of the Appeals Board shall be limited to actual expenses and per diem allowances of the Impartial Umpire which shall be disbursed from the budgeted funds of the National Joint Board.

Sec. 3. It is understood that in signing this agreement the parties agree to bear their appropriate share of the Joint Board's expense and to furnish their representatives on the Joint Board and Hearings Panels hereinafter provided for in this agreement.

Sec. 4. It shall be the duty of the Joint Board to consider and decide cases of jurisdictional disputes in the building and construction industry,

which disputes are referred to it by any of the International Unions involved in the dispute, or an employer directly affected by the dispute on the work in which he is engaged or by a participating organization representing such employer.

Sec. 5. The Appeals Board is empowered to review and decide any appeal from a decision or ruling of the National Joint Board or a Local Board recognized under Article IV and such decision of the Appeals Board shall be final. The jurisdiction of the Appeals Board shall be discretionary and it is authorized, subject to the approval of the Joint Negotiating Committee, to prescribe rules as to the types of cases which it will accept for review. No decision of the Appeals Board shall be considered as part of the record referred to in Article III, Sec. 1(c) of this Plan. The Appeals Board shall have the authority, subject to the approval of the Joint Negotiating Committee, to establish such procedural regulations as may be required for the effective administration of this appeals procedure. A quorum of the Appeals Board shall require four regular or alternate members (one each from the basic trades, the specialty trades, and two from the participating contractors employers' association group). In the event of a tie vote, the Impartial Umpire shall cast the deciding vote.

The Appeals Board may, on its own motion, assume jurisdiction over any case at any stage of the proceedings, except a case before the Hearings Panel, either before or after the issuance of a decision, ruling or interpretation of the National Joint Board or of any of the recognized local boards.

ARTICLE III

Sec. 1. (a) Joint Board Procedure. When a dis-

pute is filed, the Joint Board shall in all cases first investigate the claims of the disputing parties to determine whether or not a disposition thereof has been made by a previous decision of record or by recorded agreement between the parties to this dispute and issue a ruling as to the decision or the agreement governing in the case, and determining which one of the parties to the dispute has a rightful claim to the work under the agreement or decision of record.

(b) If the Joint Board finds that the dispute is not covered by a decision or agreement of record, it shall render a job decision, in which the Board should consider the established trade practice and prevailing practice in the locality, and such job decision shall be effective on the particular job only on which the dispute occurred.

(c) All agreements and decisions recognized under the provisions of the Constitution of the Building and Construction Trades Department shall be considered as constituting the record.

(d) Any job decision or ruling rendered by the Joint Board under paragraphs (a) and (b) of this section many be appealed to a Hearings Panel by any of the participating National or International Unions involved or may be referred to a Hearings Panel for a national decision by action of the Joint Board. Any decision rendered by such a Hearings Panel shall immediately become part of the record referred to in paragraph (c) of this section.

(e) In jurisdictional dispute cases where International Unions, members of the Building and Construction Trades Department, AFL-CIO, and participating or stipulated employer national associations, do not have direct representation on the Board hearing a specific case, they may designate a

representative to participate in the discussion of such case.

(f) Because efficiency, cost and good management are essential to the well-being of the industry, the Joint Board should not ignore the interests of the consumer in settling jurisdictional disputes.

Sec. 2. *Hearings Panels-National Decisions.*—When a dispute is filed with the Appeals Board by a National or an International Union, with a specific request for a decision on a national basis which would become part of the record, the Board shall review the request, and if the Board finds it is an issue not already determined on a national basis by a decision or agreement of record, it shall refer the issue to the Impartial Umpire who shall call a conference of the General Presidents of the Unions involved for the purpose of determining whether or not a national agreement is possible. If an agreement is concluded and properly signed by the contesting parties and attested by the Impartial Umpire, the terms and provisions of the agreement shall remain in effect as per the provisions of the Constitution of the Department. In the event that the dispute cannot be settled by agreement or is not settled by agreement at the end of six months, the Impartial Umpire shall docket the case for hearing and decision by a hearings panel as provided below.

Sec. 3. In any case to go to a hearings panel, the Impartial Umpire shall notify all General Presidents of National and International Unions affiliated with the Building and Construction Trades Department and national participating employers' association, stating the controversy to be considered and shall allow all parties interested to intervene. Thirty days' notice shall be given of the date set

for the hearing. Briefs shall be submitted and exchanged by all parties to the dispute at least ten days prior to the hearing date.

Sec. 4. A hearings panel shall be composed of two disinterested General Presidents appointed by the Executive Council of the Department and two disinterested contractor representatives appointed by the Participating Contractors Employers' Associations together with the Impartial Umpire.

Sec. 5. The Joint Board may at its discretion and after conference between contesting unions, held by the Chairman of the Joint Board, refer a repetitive dispute which it finds not to be governed by a decision or agreement of record to the Impartial Umpire for mediation and the establishment of a hearings panel and a national decision.

Sec. 6. In the event any party to a dispute fails to present their case within the stated time, the Joint Board, the Appeals Board, and Hearings Panels shall, nevertheless proceed with the case and make its decision on the basis of the evidence presented.

Sec. 7. *Making Decisions.*—The Hearings Panel shall in every instance consider all pertinent evidence and shall render a decision if possible, within ten (10) days after the conclusion of the hearings. Copies of the Hearings Panel decision shall be sent to all parties signatory to this agreement.

Decisions of the Hearings Panel are not appealable to the Appeals Board and shall be immediately accepted and complied with by all parties to this Agreement. Any decision or interpretation by the Joint Board shall be immediately accepted and complied with by all parties subject to this Agreement unless an appeal is taken to the Appeals Board. In such event, the decision or interpretation of the

Appeals Board shall be immediately accepted and complied with by all parties to this Agreement, when such decision or interpretation has been rendered.

It is understood only those contractors who employ members of the organizations affiliated with the Building and Construction Trades Department of the AFL-CIO shall be considered as bound by this agreement when they have signed a stipulation setting forth that they are willing to subscribe to and be bound by the terms and provisions of this agreement.

Sec. 8. (a) There shall be established immediately upon the request of the Chairman of the National Joint Board, Joint Committees of those National and International Unions most affected to begin resolution of the most serious and/or repetitive disputes in the industry. Such Joint National and International Union Committees shall report the status and results of their work on dispute resolutions and other jurisdictional adjustments to the Joint Negotiating Committee quarterly meetings.

(b) Notwithstanding any other provision of the Plan, there shall be referred by the National Joint Board to a hearings panel the most repetitive disputes on a national basis as indicated by the number of work stoppages or decisions rendered by the National Joint Board and the Appeals Board. In considering such disputes the hearings panel shall ascertain whether, and to what extent, the disputed work operations are governed by a decision or agreement of record and shall make national jurisdictional determinations of work operations not governed by decisions or agreements of record which shall be binding on all parties. The Joint

Negotiating Committee is authorized to appoint a Chairman of any particular hearings panel notwithstanding the provisions of Article III, Section 2.

(c) The provisions of this agreement with respect to hearings panels shall continue in effect except as specifically modified by this section.

Sec. 9. It shall be a violation of this agreement for any local union, international union, employer or employers' association to enter into any agreement, resolution or stipulation that attempts to establish any jurisdiction which deviates from the spirit and intent of the Agreement and Procedural Rules of the Joint Board Plan.

When the Joint Board receives a protest of an alleged violation from an international union, an employer or an employers' association, it shall proceed to make a decision and to determine the action which should be taken to correct the violation consistent with the applicable legal obligations of the parties.

Failure by the Parties to accede to the decision of the Joint Board under this paragraph shall be treated in the same manner as noncompliance with a job decision.

ARTICLE IV

Sec. 1. *Local Settlements.*—In any community or locality where a plan for the settlement of jurisdictional disputes which has been recognized by the Building and Construction Trades Department now exists, it shall be used in the first instance to bring about an agreement or settlement or decision. However, any such local settlement or agreement or decision shall only apply to the particular job in question, and an appeal therefrom may be taken directed to the Appeals Board by any of the parties involved.

ARTICLE V

Sec. 1. *Stipulation Procedure.* — The Building and Construction Trades Department and all International Unions affiliated with the Building and Construction Trades Department shall, in accordance with their constitutional powers, request each of the Building and Construction Trades Councils, District Councils and Local Unions, respectively:

(a) To secure written assent or stipulation to the "Plan for Settling Jurisdictional Disputes Nationally and Locally" by all Employers' in signed agreement with said International Union, Council and/or Local Union except for such employers who are stipulated to the Plan by the action of the employers' association of which they are members; or

(b) To proceed at earliest opportunity to negotiate National Joint Board stipulation into all agreements with each employer whose employees are represented by such District Council or Local Union.

All employers' associations shall request their local chapters to stipulate their membership to the "Plan for Settling Jurisdictional Disputes Nationally and Locally" unless the national employers' association has made such stipulation. In the event a local chapter refuses to stipulate, or its members individually refuse to stipulate, the national association shall notify the National Joint Board and the Joint Negotiating Committee of the negative action of the specific local chapter and/or the individual member.

ARTICLE VI

Sec. 1. *Continuance of Work.*—Pending a decision by the Board or such settlement as may be

arrived at through the office of the Chairman of the Joint Board, there shall be no stoppage of work rising out of any jurisdictional dispute.

Contractors and subcontractors shall make work assignments in accordance with the Contractor's Responsibility as set forth in the Procedural Rules of the National Joint Board. Members of organizations affiliated with the Building and Construction Trades Department shall continue to work on the basis of their original assignment.

Sec. 2. Recognizing it is in the best interests of the parties to this Agreement, the Building and Construction Trades Department, on behalf of itself and the General Presidents of each of the affiliated National and International Unions, reaffirms their desire to eliminate work stoppages, slowdowns and other impediments to job progress and their intent to comply with the provisions of the Plan prohibiting jurisdictional strikes and agree to enforce these provisions by direction and action of their respective International Offices. Should work stoppages persist for more than forty-eight (48) hours following notification by the National Joint Board (Saturdays, Sundays and legal holidays excluded), the parties hereto agree that the contractor shall be free to pursue methods of settlement other than the Joint Board established hereunder.

Sec. 3. When the Joint Board has declared any international union or contractor to be in noncompliance, such union or contractor shall be immediately denied a representative on the Joint Board, the Appeals Board or Hearings Panel, if any, during the period of noncompliance.

ARTICLE VII

Sec. 1. It is the sense of the parties hereto that

the members and Chairman of the Joint Board shall tender to the National Labor Relations Board their services as expert witnesses in any hearing held by the Board under the provisions of Section 10(k) of the National Labor Relations Act, as amended, and that no fees shall be charged for such service beyond the statutory witness fees and mileage allowance.

Signed for the Building and Construction Trades Department, AFL-CIO:

C. J. HAGGERTY, *President.*

FRANK BONADIO, *Secretary-Treasurer.*

Signed for the Participating Contractors Employers' Associations:

J. E. SWAN, *Chairman.*

JOSEPH R. LaROCCA, *Secretary.*

Signed at the U.S. Department of Labor
April 7, 1970

Witnessed by
GEORGE P. SHULTZ, Secretary of Labor

JURISDICTIONAL AGREEMENTS ENTERED INTO BETWEEN AFFILIATED INTERNATIONAL UNIONS AND DECISIONS RENDERED AFFECTING THE BUILDING INDUSTRY THAT ARE HELD TO BE OPERATIVE BY THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT

By the

American Federation of Labor, Building and Construction Trades Department, A. F. of L., National Board for Jurisdictional Awards

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Carpenters and Painters

For the purpose of bringing about conditions of harmony and co-operation, the following agreement has this day been entered into and agreed to by and between the Brotherhood of Painters, Decorators and Paperhangers of America and the United Brotherhood of Carpenters and Joiners of America:

(1) It is agreed that the members of the United Brotherhood of Carpenters and Joiners of America shall erect and install all work in connection with, and required for, acoustical purposes up to the point of applying canvas, muslin or similar materials to take the finished decorations, which work shall be done by the members of the Brotherhood of Painters, Decorators and Paperhangers of America.

(2) The applying and erection of all mouldings, in connection with acoustical work, shall be done by members of the United Brotherhood of Carpenters and Joiners of America.

(3) If any misunderstanding arises as to the meaning or carrying out of any of the provisions contained herein, the same shall be taken up with the General Presidents of the two organizations parties hereto.

(4) This agreement to be in force and effect when approved by the Executive Board of the two organizations signatory hereto.

For the United Brotherhood of Carpenters and Joiners of America:

GEO. H. LAKEY.
J. W. WILLIAMS.
W. T. ALLEN.

For the Brotherhood of Painters, Decorators and Paperhangers of America:

JOS. F. KELLEY.
CHARLES A. CULLEN.
CLARENCE E. SWICK.

Dated December 17, 1928.

Witness:

WM. J. MCSORLEY,
President, Building Trades Department.

Lathers and Sheet Metal Workers

Agreement between the Wood, Wire and Metal Lathers' International Union and the Sheet Metal Workers' International Association to govern the installation of products manufactured by the Knapp Brothers' Manufacturing Company, of Chicago, Ill., and similar products.

In order to simplify any differences that may arise on building operations, it is agreed by both

parties to this agreement that the following products are conceded by the Wood, Wire and Metal Lathers' International Union as the work of the members of the Sheet Metal Workers' International Association:

Sanitary Metal Cove Base, No. 202.
Sanitary Metal Cove Base, No. 203.
Sanitary Metal Cove Base, No. 204.
Sanitary Metal Cove Base, No. 205.
Sanitary Metal Cove Base, No. 501.
Sanitary Metal Window Stool and Frame, No. 302.
Sanitary Metal Window Stool, No. 304.
Sanitary Metal Chalk Trough, No. 202.

It is conceded by the Sheet Metal Workers' International Association that the following products are the work of the members of the Wood, Wire and Metal Lathers' International Union:

Knapp Metal Base Grounds and Screeds, styles Nos. 1, 1½, 2, 42, 49.
Knapp Metal Casing Beads, Nos. 39 and 41.
Eclipse Metal Picture Mould, No. 23.
"Royal" Metal Picture Mould, No. 20.
Knapp Sanitary Metal Chair Rail, No. 500.
Metal Bull Nose Beads and Metal Corner Beads of every description.
Inside and Outside Corner Fittings.

This agreement made and entered into January 12, 1926.

WOOD, WIRE AND METAL LATHERS' INTERNATIONAL UNION.
JOHN H. BELL, *Gen. Pres.*
WM. J. McSORLEY, *1st Gen. Vice Pres.*
A. D. YOUNG, *Gen. Sec.-Treas.*

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION.

JOHN J. HYNES, *Gen. Pres.*
WM. L. SULLIVAN, *Gen. Sec.-Treas.*
ROBERT BYRON, *Int. Rep.*

EXPLANATION

Sanitary Metal Cove Base, No. 202:

Used at intersections of floors and walls or partitions and comes 4 in. and 6 in. high. This base is erected before plastering and is so set as to form a ground screed for plastering and for the finished cement floor.

Sanitary Metal Cove Base, No. 203:

Used at intersections of floors and walls or partitions and comes in widths of 4 in. and 6 in. This is a flush base placed after floors and plastering is completed.

Sanitary Metal Cove Base, No. 204:

Is similar to No. 203 except that it comes in two sections where No. 203 comes in but one section.

Sanitary Metal Cove Base, No. 205:

Is similar to No. 204 except that the base is put in place before plastering and the top portion of it forms a ground for plastering. It comes 4 in. and 6 in. wide.

Sanitary Metal Cove Base, No. 501:

Is similar to No. 202 with the exception of a very little change in its form.

Sanitary Metal Window Steel and Frame, Nos. 302 and 304:

Is a metal dumb running from 4 in. to 6 in. in width and a return on wall which forms a plaster ground.

Sanitary Metal Chalk Trough, No. 303:

As its name implies, is a chalk trough to go under blackboards in schoolhouses and is placed after plastering is completed.

It will hardly be necessary for me to explain that portion of the work which the Sheet Metal Workers concede to come under our jurisdiction, as you must be familiar with the names of the different materials mentioned in the agreement.

Painters and Plasterers

New York, N. Y., February 16, 1928.

This agreement entered into by and between the Operative Plasterers and Cement Finishers' International Association and the Brotherhood of Painters, Decorators and Paperhangers of America, in the matter of jurisdiction to govern the application of California Stucco "CRAFTEX," "TEXTONE" and other materials of like character, shall be as follows:

This agreement shall become effective February 16, 1928, that the applying of all California Stucco shall be the work of the Plasterers' organization. That the finishing of the same it is agreed that the Plasterers shall be permitted to apply one wash and

thereafter all washing and the applying of colors shall be under the jurisdiction of the Brotherhood of Painters.

It is hereby agreed that all "CRAFTEX," "TEXTONE" or other material of the same character, when applied over a scratch or brown coat of plaster, shall be the work of the Plasterer, said material to be applied with a trowel, or other usual methods of plastering.

It is hereby agreed that all "CRAFTEX," "TEXTONE" or other material of like character, when applied over a sand finish or white coat of plaster, shall be the work of the Painter, said material to be applied with a brush, or other usual method of painting.

It is agreed that when the material in question is applied to show windows for decorative purposes, and does not exceed 150 yards in all, it shall be the work of the Painter, and when the work exceeds 150 yards and applied over a scratch or brown coat of plaster, it shall be the work of the Plasterer.

For Plasterers:

EDW. J. MCGIVERN.
T. A. SCULLY.

For Painters:

JOS. F. KELLEY, *3d G. V. P.*
CHAS. A. CULLEN, *3d G. V. P.*

Attest:

WM. J. MCSORLEY,
Pres., Building Trades Department.

Carpenters and Lathers

Agreement entered into between the representatives of the United Brotherhood of Carpenters and Joiners and Wood, Wire and Metal Lathers' International Union, January 14, 1903.

Pending the action of their convention, the United Brotherhood of Carpenters and Joiners of America agree not to assert jurisdiction over any iron work including iron or wire lathing, studding, or any other exclusively iron work claimed by the Wood, Wire and Metal Lathers' International Union.

The Wood, Wire and Metal Lathers' International Union agree that we will not assert jurisdiction over or allow our members to perform any wood work, including shingling, wooden arches, door or window frames, wooden studding or furring, or any other carpenter or wood work, except wooden lath to receive plastic material.

Signed for the United Brotherhood of Carpenters and Joiners of America:

WM. D. HUBER, *President.*
FRANK DUFFY, *General Secretary.*

Signed for the Wood, Wire and Metal Lathers' International Union:

CHAS. LANGLANDS,
JOHN STEVENS, *Committee.*

Carpenters and Lathers

August 21, 1923.

RELATIVE TO JURISDICTION OVER MATERIAL KNOWN AS CELOTEX

Further taking up the question of jurisdiction over the material known as "CELOTEX," and in accordance with the tentative proposals on this subject between our organizations, we, the undersigned, hereby agree that the material known as Celotex Lath comes under the jurisdiction of the Lathers' International Union; all other Celotex material comes under the jurisdiction of the United Brotherhood of Carpenters and Joiners.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA.
WM. L. HUTCHESON, *Gen. Pres.*
FRANK DUFFY, *Gen. Sec.*

WOOD, WIRE AND METAL LATHERS' INTERNATIONAL UNION.
JOHN H. BELL, *Gen. Pres.*
A. D. YOUNG, *Sec.-Treas.*

Boiler Makers and Iron Workers
APPROVED MAY 28, 1924

It is agreed that the following work shall be recognized as coming under the jurisdiction of the International Brotherhood of Boiler Makers, Iron Ship Builders and Helpers of America:

SECTION 1. The construction, erection and assembling of all boilers, parts and work in connection therewith, including boiler fronts, heat units, water walls, tube supports and casings (except the unloading, hoisting, or lowering and placing of complete boilers, steam drums and assembled sections of water tube boilers to their approximate positions), all connections between the boiler and stack

(commonly known as breeching), built of sheet steel or iron, supports for the same (which are not part of the building structure), uptakes, smoke boxes, air and water heaters, smoke consumers, hot or cold air ducts (except when used for ventilating purposes).

SEC. 2. Iron and steel ship building.

SEC. 3. Pontoons, purifying boxes, gas generators and wash tanks or scrubbers, standpipes, brewery vats (except glass enameled tanks), water tower (except structural frames and balconies), all iron and steel pipe line, penstock and flume work, steam, air, gas, oil, water, or other liquid tanks or containers requiring tight joint, including tanks of riveted, caulked or welded construction in connection with swimming pools.

SEC. 4. The following work in and around blast furnaces and rolling mills, viz.: hot stoves, blast furnaces, cupolas and dump cars, and all steam, air, water, gas, oil or other liquid tight work (all other iron and steel work in such buildings shall be done by Iron Workers).

SEC. 5. Gasometers, including all frame work in connection with same.

SEC. 6. All iron or steel stacks, in connection with power plants, furnaces, rolling mills, manufacturing plants, and all other power plants (except small power plants in connection with hotels or office buildings and sectional or other steel stacks erected in office buildings or hotels), and all extensions or repairs of such stacks shall be done by Boiler Makers.

It is agreed that the following work shall be recognized as coming under the jurisdiction of the International Association of Bridge, Structural and Ornamental Iron Workers:

SECTION 1. The erection and construction of all iron, steel and ornamental iron entering into the erection and construction of the following: Buildings, bridges, viaducts, subways and tunnels, towers, hoists, car dumpers, cranes, coal conveyors, ore unloaders, stokers, supports for boilers, coal bins and hoppers, ash chutes and hoppers, rock, coke, sand and ore bins and hoppers, kilns, driers, coolers, crushers, mixers, pulverizers, ronsters, all caisson work, safe deposit boxes, vaults, vestibules and doors, glass enameled tanks, malt drums, fans, and hot rooms and ventilators including air ducts in connection therewith, all swimming pools (except as specified in Section 3 of the Boiler Makers' classification of work in this agreement) and the wrecking of all the above work shall be done by Iron Workers.

SEC. 2. The erection and construction of all sectional and other steel or iron stacks, erected in office buildings and hotels; and all stacks erected in small power plants in connection with hotels and office buildings, and the extension and repair to such stacks shall be the work of the Iron Workers.

SEC. 3. The erection and construction of structural iron work and balconies in connection with water towers shall be the work of the Iron Workers.

SEC. 4. The erection and construction of all steel and iron work around rolling mills and blast furnaces (except that specified in Section 4 of the

Boiler Makers' classification of work) shall be done by Iron Workers.

SEC. 5. The unloading, hoisting or lowering and placing of complete boilers, steam drums, and assembled sections of water tube boilers to their approximate positions shall be done by Iron Workers.

SEC. 6. The burning and welding on work awarded to the Boiler Makers shall be done by Boiler Makers, and the burning and welding on work awarded to the Iron Workers shall be done by Iron Workers.

SEC. 7. Any further disputes that may arise between the parties of this agreement shall be first considered by the respective General Presidents. Upon their failure to agree, the question shall be submitted to arbitration. None of the work definitely decided upon in this agreement shall be subject to further arbitration.

For the International Brotherhood of Boiler Makers, Iron Ship Builders and Helpers of America:

(Signed) J. A. FRANKLIN.
WM. ATKINSON.
JOS. P. RYAN.
MARTIN DALEY.

For the International Association of Bridge, Structural and Ornamental Iron Workers:

(Signed) P. J. MORRIN.
W. J. MCCAIN.
DAN J. O'SHEA.
MICHAEL C. ARTERY.

Sheet Metal Workers and Boiler Makers

Mr. John J. Hynes, *General President*,
642 Transportation Building,
Washington, D. C.

Dear Sir and Brother:

The International Brotherhood of Boiler Makers, Iron Ship Builders and Helpers of America, through the undersigned duly authorized officers, hereby officially recognize and acknowledge the established jurisdictional rights of the members of the Sheet Metal Workers' International Association to manufacture, assemble, erect and install all sheet metal work of No. 10 gauge or lighter when used in connection with the construction, equipment, alteration and repair of buildings.

In witness thereof we hereby affix our hand and seal this 16th day of October, 1930.

For the International Brotherhood of Boiler Makers, Iron Ship Builders and Helpers of America:

(Signed) J. A. FRANKLIN,
International President.

For the Sheet Metal Workers' International Association:

(Signed) JOHN J. HYNES,
General President.

Iron Workers and Elevator Constructors

June 9, 1931.

The undersigned representatives of the International Association of Bridge, Structural and Ornamental Iron Workers, and the International Union of Elevator Constructors, Operators and

Starters mutually agree that both organizations shall co-operate with and support each other to maintain Union conditions and their members upon the work of their respective trades, and that for the purpose of establishing complete harmony between both organizations, this agreement is hereby entered into, effective on and from this date.

All semi or full automatic elevator doors or gates, and all operating devices shall be the work of the Elevator Constructors.

All elevator doors or gates manually operated, including all elevator enclosures, front, facias, sills, frames and bucks, shall be the work of the Iron Workers.

Steel trusses, girders and supports for escalators, where riveted or welded, shall be the work of the Iron Workers.

All other escalator work shall be the work of the Elevator Constructors.

All theater curtains, back-stage lifts, and equipment in connection therewith, shall be assembled and erected by the Iron Workers, excepting the operating machinery.

Orchestra and Console lifts shall be assembled and erected by the Elevator Constructors, including the machinery in connection therewith, and all machinery in connection with theater curtains and back-stage lifts.

(The above two paragraphs shall also apply to auditoriums, schools, convention halls, and other buildings similarly equipped.)

All of the above is hereby agreed to and accepted by the signatories to this agreement for their respective organizations.

For the International Association of Bridge, Structural and Ornamental Iron Workers:

(Signed) P. J. MORRIN,
General President.
WM. H. POPE,
5th Gen. Vice-Pres.
JOHN M. SCHILLING,
7th Gen. Vice-Pres.
W. J. McCAIN,
General Secretary.

For the International Union of Elevator Constructors, Operators and Starters:

(Signed) FRANK FEENEY,
International President
J. C. MACDONALD,
1st Int. Vice-Pres.
WALTER SNOW,
2nd Int. Vice-Pres.
JOSEPH F. MURPHY,
Int. Sec.-Treas.

International Union of Operating Engineers and United Association of Journeymen Plumbers and Steam Fitters

AGREEMENT

In the controversy between the United Association of Plumbers and Steam Fitters and the International Union of Steam and Operating Engineers in Cleveland, Ohio, over an air compressor that was used by the Plumbers for boring holes in a concrete floor, and which was referred by the local unions of Cleveland and the International representatives of both organizations to the International Presidents of the United Association of Plumbers and

Steam Fitters and the International Union of Steam and Operating Engineers for adjustment, we find that at the A. F. of L. Convention held in Norfolk, Va., in 1907, Resolution No. 124, which was presented by the International Union of Steam and Operating Engineers and adopted by the Convention, gives jurisdiction over this work to the International Union of Steam and Operating Engineers.

We also find in the jurisdiction claims filed by the International Union of Steam and Operating Engineers with the Building Trades Department upon their entrance into the Department, that this work is covered in their jurisdiction by the following paragraph:

"HOISTING AND PORTABLE"

"All hoisting and portable engines on building and construction work, where operated by steam, electricity, gasoline, hydraulic or compressed air, including pumps, siphons, pulsometers, concrete mixers, air compressors and elevators, where used for hoisting building material, street rollers, steam shovels, dinky locomotives, cableway, clam shells and pile drivers."

Both International Presidents met in Washington on January 5, 1925, at the headquarters of the Building Trades Department, and upon finding the action of the A. F. of L. Convention upon Resolution No. 124 and the jurisdiction filed with the Building Trades Department that this work of operating air compressors belongs to the Hoisting and Portable Engineers, it is agreed that the local unions will be notified to that effect.

(Signed) JOHN COFFEEN,
(Signed) ARTHUR M. HUDDELL.

Sheet Metal Workers' International Association and United Association of Journeymen Plumbers and Steam Fitters

AGREEMENT

INDIANAPOLIS, IND.
January 28, 1928.

Report of the Committees appointed by the United Association of Journeymen Plumbers and Steam Fitters and the Sheet Metal Workers' International Association, to take up the matter of sheet lead in building construction.

This Committee met at Hotel Severin, Indianapolis, Ind., Friday, January 27, 1928, with the following representatives in attendance: Wm. Lynn, George Masterton and Bert Stephenson, representing the United Association of Plumbers and Steam Fitters, and James Lennon, Richard Pattison and James T. Moriarty, representing the Sheet Metal Workers International Association.

The Committee organized with Wm. Lynn, Chairman; James T. Moriarty, Secretary. The Committee was visited by Robert Fox, Local Agent of the Plumbers, and Charles Wilson, Local Agent of the Sheet Metal Workers. After hearing both agents, the Committee went into executive session and after holding several meetings, reached the following agreement:

"Sheet lead work used in roofing, gutters, valleys, flashings in connection with roofing, and ducts in direct connection with ventilation systems shall be the work of the Sheet Metal Workers, members of the Sheet Metal Workers' International Association. All other sheet lead work

including roof flashings in connection with plumbing, shall be the work of the Plumbers, members of the United Association of Journeymen Plumbers and Steam Fitters."

We, the undersigned committee, recommend that this agreement shall go into effect when approved and signed by the International Presidents of the above organizations.

(Signed) WM. LYNN,
(Signed) GEORGE MASTERTON,
(Signed) BERT STEPHENSON,
Representing United Association of Journeymen Plumbers and Steam Fitters.

(Signed) JOHN COMFIELD,
General President.

(Signed) JAMES LENNON,
(Signed) R. PATTISON,
(Signed) JAMES T. MORIARTY,
Representing Sheet Metal Workers' International Association.

(Signed) JOHN J. HYNES,
General President.

Bricklayers, Masons and Plasterers' International Union and Operative Plasterers and Cement Finishers' International Association

AGREEMENT entered into between the B., M. & P. I. U. of America and the O. P. & C. F. I. A., at the Headquarters of First-Named Organization, Odd Fellows Bldg., Indianapolis, Ind.

FEBRUARY 17, 1911.

First. The O. P. & C. F. I. A. agrees to a mutual interchange of cards with the B., M. & P. I. U., same to cover all cities where the O. P. & C. F.

I. A. has locals and the B., M. & P. I. U. has mixed locals, and that the following stipulations be recognized.

Second. The support to be given in the interest of either organization in the localities where the B., M. & P. I. U. controls shall be determined by the Executive Boards of both organizations in conference when the necessity for such support arises. No work to be performed until the conference board comes to a decision.

Third. The B., M. & P. I. U. recognizes and concedes the sole right of the O. P. & C. P. I. A. to organize and charter unions composed of exclusive plasterers in all localities where a sufficient number of bona fide resident plasterers can be secured, and guarantees that no interference on their part shall take place, except under condtions hereafter stated, and that no exclusive plasterers' union shall be chartered by the B., M. & P. I. U. under any circumstance.

Fourth. The conditions existing under which an exclusive union of plasterers is permitted to be organized in territory already controlled by the B., M. & P. I. U. having been a matter of complaint at the conference, the representatives of the B., M. & P. I. U. have determined that the grounds upon which the complaint is based are justified and that same demand a concession upon their part—i. e., that of permitting the bricklayers and stonemasons of a mixed union the right to cast a vote upon the question of the plasterer members being allowed to form a separate union. Said representatives agree to eliminate the bricklayer and stonemason when such votes are being taken in the future, and that only the recognized plasterer members of the union shall be allowed to cast a vote upon such proposi-

tions. That in all cases where two-thirds of such plasterer members vote in favor of separation, the General Secretaries of the O. P. & C. F. I. A. and the B., M. & P. I. U. shall be notified of same by the secretary of the union, and a charter shall be immediately granted.

Fifth. The B., M., & P. I. U. agrees that the subcontracting of the plastering contract of a bona fide employer or general contracting firm shall not be objected to by any of its subordinate unions upon all general contracts exceeding $50,000, pending the convening of the next biennial convention of the B., M. & P. I. U., at which convention legislation will be asked for that will make permanent the relief ordered at this time.

Sixth. That the O. P. & C. F. I. A. charters be withdrawn from Springfield, Newark, and Rochester, and the members of each respective union be admitted to membership in the B., M. & P. I. U. local free of any penalty or initiation fee. All fines placed upon O. P. & C. F. I. A. members covering their actions in the above-named three cities are also hereby removed.

Seventh. In any city under a mixed charter of the B., M. & P. I. U. where there are but three or less plasterers affiliated, and there are five or more plasterers who are bona fide residents who are not members, the O. P. & C. F. I. A. is accorded the right to organize a union, and all B., M. & P. I. U. members following plastering shall become members of the newly chartered exclusive (O. P. & C. F. I. A.) Plasterers' Union free of initiation fee.

"Offensive and Defensive Alliance"

Eighth. That in all movements, "offensive or defensive," no subordinate local of either Interna-

tional Union shall be permitted to take any action whatsoever until the question requiring joint action shall have first been acted upon and determined by the Presidents of the O. P. & C. P. I. A. and the B., M. & P. I. U.

Ninth. No movement of an "offensive" or "defensive" character shall be countenanced in cases where such would be in violation of any existing agreements.

RULES GOVERNING INTERCHANGEABLE CARDS

The rules governing the issuing of the Interchangeable traveling card and the clearance card shall be subject to the rules agreed upon at the conference of October 30, 1908, and as revised at the conference of February 13, 1909.

In Witness Whereof, We, the undersigned, hereby set our hand and seal this eighteenth day of February, 1911.

For the O. P. & C. P. I. A.:

JOHN DONLIN, *President.*
EDW. J. MCGIVERN, *1st Vice-Pres.*
(SEAL)
PETER G. COOK, *3rd Vice-Pres.*
W. A. O'KEEFE, *Organizer.*

For the B., M. & P. I. U. of America:

WM. J. BOWEN, *President.*
THOS. R. PREECE, *1st Vice-Pres.*
WM. DOBSON, *Secretary.*

ACCORDING

At a meeting of the Joint Conference between the Executive Boards of the Bricklayers, Masons

and Plasterers' International Union of America and the Operative Plasterers and Cement Finishers' International Association of the United States and Canada held in Atlantic City, February 27, 1930, it was agreed, that the above-named material and those of a similar character shall be installed on a fifty-fifty basis equally divided between the membership of the Operative Plasterers and Cement Finishers' International Association of the United States and Canada and the Bricklayers, Masons and Plasterers' International Union of America irrespective of thickness.

Artificial Stone

In order to reach an amicable understanding between the B., M. & P. I. U., and the O. P. & C. F. I. A., regarding the installation of artificial stone or marble, the O. P. & C. F. I. A. concedes to the membership of the B., M. & P. I. U. the installation of artificial stone or marble when same are precast and of ¾ of an inch or more in thickness. And the B., M. & P. I. U. concedes to the O. P. & C. F. I. A. the installation of said imitation stone or marble when same are less than ¾ of an inch in thickness, also said artificial stone when same are applied to channel iron furring. It is also understood that each party hereto will confine their method of erection or application to the Craft method of erection or application employed heretofore and that the ¾ inch thickness referred to heretofore is ¾ inch in the body of piece not inclusive of any relief members or enrichments appearing on the surface.

Tilelayers

Owing to the fact that the Tilelayers' organization has ignored agreements held between themselves and the O. P. & C. F. I. A.; also the B., M. & P. I. U., the agreements were reported abrogated. The B., M. & P. I. U. assuming control of the tilelaying business.

AGREEMENT

(Preparation of Walls and Ceilings To Receive Tile)

Agreement entered into this 22nd day of August, 1917, between the B. M. & P. I. U. and the O. P. & C. F. I. A. pertaining to the preparing or plastering of walls and ceilings which are to receive tile;

First. It is agreed that the Plasterers of the O. P. & C. F. I. A. and the B., M. & P. I. U. shall prepare or plaster all walls which are to receive tile. They shall plumb, rod and square all walls and scratch the same so as to guarantee adhesion of the final coat which shall be put on by the Tilelayer to act as a bed for his tile.

Second. It is further agreed that the Plasterers of either the O. P. & C. F. I. A. or the B., M. & P. I. U. shall prepare or plaster all ceilings which are to receive tile. All ceilings must be leveled and rodded and properly scratched so as to guarantee adhesiveness of the final coat which shall be applied by the Tile Setter and act as a bed for his tile.

Third. It is further agreed that the Plasterers shall use only sand and cement in the preparation of work above stipulated unless otherwise specified by the architect.

Fourth. Any member of either organization that violates the above rules shall, upon conviction, be fined the sum of $25.00.

"Resolved, to qualify the agreement entered into between the Interstate Mantel and Tile Contractors' Association, Operative Plasterers and Cement Finishers' International Union and the Bricklayers, Masons and Plasterers' International Union of America to read:

"That three bathrooms, vestibules and small halls in private residences shall be plastered by the tile setter."

AGREEMENT

"Agreement entered into this —— day of ——, 1918, by and between the Interstate Mantel and Tile Contractors' Association, the Operative Plasterers and Cement Finishers' Association of the United States and Canada, and the Bricklayers, Masons and Plasterers' International Union of America.

"The purpose of this agreement is to prevent hereafter jurisdictional disputes that have existed for the past twenty years between the tile and plastering interests, and which have resulted in many strikes among the workmen involved to the detriment of employer and employee and the building public.

"First. It is agreed that all materials for plastering work entering into the preparation of all walls, ceilings, etc., to receive tile and other work, and conceded as coming under the jurisdiction of the Mantel and Tile Contractors' Association, shall be included in the estimate and contract and the work shall come under the jurisdiction of the Mantel and Tile Contractors.

"Second. It is agreed that the plasterers of the O. P. & C. F. I. A. and the B., M. & P. I. U.

shall prepare or plaster all walls and ceilings which are to receive tile, except the final setting bed, which shall be applied by the tilelayer.

"Third. All preparation work shall be done in a thorough and workmanlike manner, and it is understood and agreed that all walls and ceilings shall be plumbed, leveled and rodded under the direct supervision of the tile layers.

(Signed) ED. J. McGIVERN,
President O. P. & C. F. I. A.
PETER G. COOK,
Vice-President O. P. & C. F. I. A.
T. A. SCULLY,
Secretary O. P. & C. F. I. A.
W. A. O'KEEFE,
General Organizer O. P. & C. F. I. A.
WM. J. BOWEN,
President B., M. & P. I. U.
THOS. R. PREECE,
Vice-President B., M. & P. I. U.
WM. DOBSON,
Secretary B., M. & P. I. U."

Carpenters and Sheet Metal Workers

AGREEMENT

For the purpose of bringing about conditions of harmony and co-operation the following agreement is this day entered into and agreed to by and between the Sheet Metal Workers' International Association and the United Brotherhood of Carpenters and Joiners of America:

It is agreed that members of the United Brotherhood of Carpenters and Joiners of America shall erect and install all interior metal trim such as

bucks, jambs, doors, casings, base, chair-rail, picture mouldings, partitions, and all other material generally referred to as trim except toilet partitions, which shall be done by Sheet Metal Workers. Also when a sheet metal contractor who is engaged in manufacturing and erecting sheet metal products for building, such as cornices, sky-lights, metal roofing, ventilating work, etc., manufactures the material referred to as trim, with members of the Sheet Metal Workers' International Association they shall do the erecting of same in a manner that will comply with the working agreement now in force between the Sheet Metal Workers and said firms.

It is further agreed that in the setting of metal window frames that when frames are set, stayed, plumbed or braced such work shall be done by Carpenters, but if set or placed in an opening in walls left when a building is erected the work shall be done by Sheet Metal Workers. The hanging and adjusting of metal sash shall be done by Sheet Metal Workers. It is further agreed that any metal work in connection with store fronts shall be done by Sheet Metal Workers.

It is further understood and agreed that in the erection of metal column forms the erection shall be done by Sheet Metal Workers. Any framing in connection therewith shall be done by Carpenters.

It is further agreed that the installation of metal lockers, also the erection of ordinary plain metal shelving shall be done by Sheet Metal Workers.

It is further understood and agreed that the members of neither organization shall work on any building where non-union men of the other craft are employed.

If any misunderstanding arises as to the meaning or carrying out of any of the provisions contained

herein the matter will be taken up with the General Presidents of the two organizations.

Dated March 21, 1928.

For United Brotherhood of Carpenters and Joiners:

WM. L. HUTCHESON, FRANK DUFFY,
T. M. GUERIN.

For Sheet Metal Workers' International Assn.:

JOHN J. HYNES, R. PATTESON,
ROBT. BYRON, W. J. ROONEY,
JAMES T. MORIARTY, THOMAS FAY.

In the last part of paragraph Two of the agreement entered into the 21st day of March, 1928, by and between the Sheet Metal Workers' International Association and the United Brotherhood of Carpenters and Joiners of America, beginning with "Also," it is understood and agreed that this refers only to the firms now manufacturing hollow metal doors and trim in their own shops in the City of Chicago, and the erecting of same in accordance with the working agreement between the Sheet Metal Workers and said firms, now in force.

WM. L. HUTCHESON JOHN J. HYNES

Sheet Metal Workers-Asbestos Workers Agreement

Agreement entered into this 13th day of April, 1939, by and between the Sheet Metal Workers' International Association and the International Association of Heat and Frost Insulators and Asbestos Workers covering the application of insulating and acoustical materials on inside and outside of sheet metal ducts and fittings in connection with ventilation and air-conditioning systems.

1. All insulating materials applied on outside of sheet metal ducts and fittings is recognized as coming within the jurisdiction of the International Association of Heat and Frost Insulators and Asbestos Workers.

2. All acoustical materials applied inside of sheet metal ducts and fittings, in shop or on job prior to erection of said ducts and fittings by Sheet Metal Workers, is recognized as coming within the jurisdiction of the Sheet Metal Workers' International Association.

3. All acoustical materials applied inside of sheet metal ducts and fittings on job after said ducts and fittings have been erected by Sheet Metal Workers is recognized as coming within the jurisdiction of the International Association of Heat and Frost Insulators and Asbestos Workers.

4. Any dispute or controversy arising out of the application or interpretation of this agreement shall be referred to and settled immediately by the General Presidents of the two International Unions involved, in accordance with the purpose and intent of this agreement.

(Signed)

FOR SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION.

ROBT. BYRON, *General President.*
JAMES T. MORIARTY.
WM. O'BRIEN, *General Secretary-Treasurer.*

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS.

JOSEPH A. MULLANEY, *General President.*
C. W. SICKLES, *General Secretary-Treasurer.*

Between the United Association of Journeymen Plumbers and Steamfitters and the United Brotherhood of Carpenters and Joiners of America.

Bath and Toilet Room Accessories and Medicine Cabinets

It is agreed that the installation of all bath and toilet room accessories, such as paper holders, towel rails or bars, glass holders, glass shelves, etc., however installed, shall be the work of the members of the United Association of Journeymen Plumbers and Steamfitters.

Further, that the installation of bath and toilet room medicine cabinets shall be the work of the members of the United Brotherhood of Carpenters and Joiners of America.

United Association of Journeymen Plumbers and Steamfitters.
George Masterton.
John Coffield.

United Brotherhood of Carpenters and Joiners of America.
M. A. Hutcheson.
Wm. L. Hutcheson.

Dated at Cincinnati, Ohio, September 29, 1939

AGREEMENT

Agreement between the United Brotherhood of Carpenters and Joiners of America and the Operative Plasterers' and Cement Finishers' International Association of the United States and Canada, at the headquarters of the First Named Organization, Carpenters' Building, Indianapolis, Ind., June 13, 1944.

This Agreement entered into by and between the United Brotherhood of Carpenters and Joiners of America, the Operative Plasterers' and Cement Finishers' International Association of the United States and Canada, in the matter of jurisdiction to govern the fabrication and setting of screeds and forms used in connection with the placing and finishing of cement or concrete, shall be as follows:

1. The setting of screeds of lumber, metal or other materials to determine the proper grade of concrete, when used to serve as forms, such as 2" by 4"s, or other plain pieces of material, when held in place by stakes and/or spreaders shall be done by Cement Finishers, members of the O. P. & C. F. I. A. and B. M. & P. I. U.

A screed is a strip of wood or metal used as a guide for leveling or grading a concrete floor, slab or sidewalk.

2. The fabricating of all screeds and stakes, for any purpose, and the construction and setting of all forms shall be done by Carpenters, members of the U. B. of C. & J. of A.

A form is a built-up section of wood, metal or composition board used for the purpose of moulding concrete to a given line or shape.

3. Any bulkhead that is one single board in height, and that has no key attached or which is not notched or fitted shall be set and braced or staked by Cement Finishers, providing same is used as a screed. The term bulkhead shall mean a form or screed erected for the purpose of separating pours of concrete. Any bulkhead that must be notched or fitted, or which has a key attached, or which is over one board high, or any bulkhead that is not used as a screed, shall be fabricated and set by Carpenters.

For the U. B. of C. & J. of A.:

M. A. HUTCHESON, *First General Vice President.*

JOHN R. STEVENSON, *Second General Vice President.*

For the O. P. & C. F. I. A.:

JOHN E. ROONEY, *General President.*

JOHN J. HAUCK, *First Vice President.*

MEMORANDUM OF UNDERSTANDING

By and between

The International Brotherhood of Electrical Workers

and

The International Hod Carriers', Building and Common Laborers' Union of America*

1. The International Brotherhood of Electrical Workers recognizes the jurisdiction of the International Hod Carriers', Building and Common Laborers' Union of America over such work as all digging, excavating, grading, backfilling, cutting and replacing of all pavements and the handling of all material in connection therewith, performed for Gas Utility Companies, affiliated or non-affiliated with the Electric Utilities, in all cases except where the International Brotherhood of Electrical Workers has agreements now in effect as of this date. Such agreements shall continue until the next termination period effective in said agreements and the International Brotherhood of Electrical Workers agrees to exercise all options to change said agreements to conform with the description of jurisdiction as above outlined by serving such notice as may be required to effect such change. If, however, the International Brotherhood of Electrical Workers, at such period or periods of termination, is convinced that the termination of any such agreements would impair the prestige of the Electrical Workers in the Electric Public Utility field, the

* For full report see page 133 of the Proceedings of the 54th Annual Convention, New Orleans, 1949.

matter of termination of said agreements will be taken up and discussed by both parties to this memorandum of understanding with the protection of the mutual welfare and interest of both parties to this memorandum of understanding being the paramount and deciding factor. Where such termination or changes are effected, the work shall revert to and be considered the work of the Laborers, parties hereto.

2. It is recognized by both parties hereto that all provisions with respect to the work herein defined will apply in the instances of work in connection with water and steam, in the same manner and to the same effect as applies to gas. Likewise, the provisions relative to agreements now in effect apply on steam and water equally with gas.

3. The International Brotherhood of Electrical Workers reserves its established jurisdiction over right of way clearance performed by members of the International Brotherhood of Electrical Workers employed directly by Electric Utilities.

4. The International Brotherhood of Electrical Workers recognizes that the work of right of way clearance, with the exception of the digging of post holes and anchors and the back-filling of same, performed on or in connection with transmission line construction, through contracts, or on R. E. A. projects, is the jurisdiction of the International Hod Carriers', Building and Common Laborers' Union of America.

5. The International Hod Carriers', Building and Common Laborers' Union of America recognizes the jurisdiction of the International Brotherhood

of Electrical Workers over handling of all electrical material, beginning with the unloading at the first point of delivery on the job, and continuing through its ultimate use or disposal.

6. Both parties to this understanding and agreement agree that there shall be no compacts entered between either party and any third parties in a jurisdictional issue affecting or involving either party hereto.

7. Both parties hereto agree that in the instance of any issues arising on work not herein covered or outlined, the settlement and disposal of such issues shall be only through procedures before proper tribunals, established within the American Federation of Labor, or through methods agreed upon by the International Presidents of the organizations parties hereto.

The International Brotherhood of Electrical Workers and the International Hod Carriers', Building and Common Laborers' Union of America hereby affix the signatures of the respective International Presidents in acknowledgement of an agreement to terms of understanding herein described this third day of February, 1940, at Miami, Fla.

(Signed) D. W. TRACY,

General President, International Brotherhood of Electrical Workers.

(Signed) JOS. V. MCGUIRE,

General President, International Hod Carriers', Building and Common Laborers' Union of America.

ARTICLES OF AGREEMENT

Between the United Association of Journeymen Plumbers and Steamfitters of the United States and Canada, Hereinafter Referred to as the United Association, and the International Brotherhood of Boiler Makers, Iron Ship Builders, Welders and Helpers of America, Hereinafter Referred to as Boiler Makers.

For the purposes of eliminating jurisdictional disputes between the membership of these two International Unions, and for the further purpose of laying the groundwork for extensive cooperation and fraternal good will between the two memberships, and for the additional purpose of cooperating together in the unionization of those industries and firms in which we are jointly interested, the representatives of the two International Unions hereby undertake to dispose of the questions existing between them which have provoked jurisdictional disputes. In so doing it should be understood by all concerned that we are attempting only to settle controversies between ourselves and are not undertaking to settle disputes which either of the organizations herein involved may have with other International Unions, or to dispose of work which properly belongs to any other International Union.

Refinery Installation

1. On the equipment that has caused considerable misunderstanding in the industry, the United Association of Journeymen Plumbers and Steamfitters and the International Brotherhood of Boiler Makers, Iron Ship Builders, Welders and Helpers of America have agreed on the following division of work, viz.:

2. The installation of tubes in pipe stills or furnaces, commonly called oil heaters, will be handled, installed and finished by a composite crew equal in number of Boiler Makers and members of the United Association.

3. The erection of furnace frame, casing, doors and support will be performed by Boiler Makers.

4. All circulating piping, pipe hangers and oil burners will be installed by the United Association.

5. The installing or removing of cooler, condenser and heat exchanger tube, or tubes of the shell and tube type of equipment, by any mode or method, shall be the work of the Boiler Maker.

6. The building of cooler, condenser and heat exchanger pipe coils, by any mode or method, shall be the work of the United Association.

7. The handling and setting of all work in connection with bubble or fractionating towers, reaction chambers or evaporators, trays, cups, baffles, tube sheets, tubes or other interior equipment shall be the work of the Boiler Maker.

The United Association shall perform all internal and external piping, valves, strainers and floats.

8. The application or installation of braces and supports, riveted to pressure vessel, is the work of the Boiler Maker.

9. The handling and placing of washers and agitators, including baffles, is the work of the Boiler Maker.

10. Cooling tower pans, frames and condenser boxes is the work of the Boiler Maker.

Coils and all pipe work in connection with same is the work of the United Association.

11. All work in connection with coke stills and asphalt stills is the work of the Boiler Maker.

All pipe work in connection with the same is the work of the United Association.

12. The handling and setting of completed heat exchangers is the work of the United Association.

Pipelines

13. It is hereby recognized that all transportation oil and gas lines is the work of the United Association.

14. Plate fabricated aqueducts or water lines to the point where it enters city or town distributing system, whether riveted or welded, is the work of the Boiler Maker.

Where flange or other patent joints are used it is the work of the United Association.

15. Plate fabricated intake and discharge lines in power plants, where riveted or welded joints are used, is work of the Boiler Maker.

Where flange or other patent joints are used it is the work of the United Association.

16. All other classes of manufactured pipe—regardless of material—used in the pipefitting industry, is the work of the United Association.

Tanks

17. Completed tanks which are an integral part of a piping job shall be installed by members of the United Association.

Knockdown or completed tanks which are not an integral part of a United Association installation, for example, brewery vats, distillery vats, etc., in or on buildings, shall be the work of the Boiler Maker.

18. All tankage for the storage of petroleum products in the petroleum industry, including bulk storage plants and all water towers, standpipes or water storage reservoirs, shall be the work of the Boiler Maker.

All pipe work in connection with same is recognized as the work of the United Association.

19. The erection and repair of gas holders is recognized as the work of the Boiler Maker.

All pipe work in connection with same is recognized as the work of the United Association.

Boilers

20. Hot and cold air and gas ducts in connection with boilers, furnaces or other duct work incidental to Boiler Makers' installation is the work of the Boiler Maker.

21. It is hereby recognized that the building of boilers, including economizers, superheaters, air heaters, casings, burner boxes, down comers, sludge boxes and sluice troughs, completed marine bent tube boilers, breechings, stacks and all air and gas ducts in connection with same is the work of the Boiler Maker.

Soot blowers, fuel piping, valves, boiler trimmings, the setting of completed boilers and knock-down cast iron boilers and all pipe work in connection with same is the work of the United Association.

22. The burning and welding on work in the jurisdiction of the United Association will be performed by the members of the United Association.

Burning and welding on work in the jurisdiction of the Boiler Maker shall be performed by the Boiler Maker.

23. The handling and rigging of all materials and equipment coming under the jurisdiction of these two trades will be performed by each respective trade.

24. It is understood that each class of work listed above, under the several sub-heads, stands alone by itself and no combination of sub-sections can be used to produce a result not contemplated by this agreement, as this agreement is fairly and honestly entered into and must be so applied.

25. Questions may arise which are not specifically covered by the articles of this agreement and it is understood that our respective officers and representatives will make a sincere effort to reach an amicable understanding based upon the broad principles herein laid down.

26. All new questions which may arise and which are not clearly covered by the terms of this agreement and that have failed of settlement locally between representatives of the two Organizations shall be jointly submitted to the two International Presidents or the officer acting in his place, with all supporting data and argument.

If the International Presidents fail to agree, they may submit same to a neutral umpire, jointly selected by them.

The work disposed of by this agreement shall not be subject to further arbitration or interpretation by any tribunal.

27. This agreement supersedes and voids all previous agreements between the United Association and the International Brotherhood, and likewise voids all decisions on controversies which occurred between the two International Organizations or between their affiliated local unions, affecting the

United Association and the International Brotherhood, or by the American Federation of Labor, or the Building and Construction Trades Department of the American Federation of Labor, or by any other tribunal prior to the effective date of this agreement.

United Association of Journeymen Plumbers and Steamfitters of the United States and Canada:

CHARLES N. RAY.
LEO A. GREEN.
MICHAEL F. GARRETT.

International Brotherhood of Boiler Makers, Iron Ship Builders, Welders and Helpers of America:

CHAS. J. MACGOWAN.
HARRY NICHOLAS.

Signed at Chicago, Ill., this 1st day of August, 1941.

Approved:

GEORGE MASTERTON,
General President.
WM. E. WALTER.
J. A. FRANKLIN,
International President.

By the action of the 35th Annual Convention of the Building and Construction Trades Department the agreement made by and between the United Association of Plumbers and Steam Fitters and the International Brotherhood of Boiler Makers, Iron Ship Builders, Welders and Helpers of America was accepted, with the understanding that this agreement incorporated in the permanent record of the Department would not interfere with

or alter the jurisdiction of any other National or International Union affiliated with the Building and Construction Trades Department.

Addendum to Agreement

Re: Clarification—Rule 21—Agreement—International Brotherhood of Boiler Makers, Iron Ship Builders, Welders and Helpers of America and United Association of Journeymen Plumbers and Steamfitters of the United States and Canada.

Subsequent to the writing of the terms of the agreement there has been a question raised regarding the jurisdiction of work in connection with attemporators which was not included in Rule 21 of the above agreement. Hence, it is agreed by the above contracting parties that the word "attemporator" shall be included in Rule 21, paragraph 1, after the word "superheaters."

It is further discovered that a further clarification of Rule 21, paragraph 2, should be made by inserting in Rule 21, paragraph 2, in the second line after the word "trimmings" the following language: "All circulating piping for appurtenances and component parts of boiler."

The amended Rule 21 would then read as follows:

"It is hereby recognized that the building of boilers, including economizers, superheaters, attemporators, air heaters, casings, burner boxes, downcomers, sludge boxes and sluice troughs, completed marine bent tube boilers, breechings, stacks, and all air and gas ducts in connection with the same is the work of the Boiler Maker."

"Soot blowers, fuel piping, valves, boiler trimmings, all circulating piping for appurtenances and component parts of the boiler, the setting of com-

pleted boilers and knockdown cast iron boilers and all pipe work in connection with same is the work of the United Association."

The agreement of August 1, 1941, between the two International Organizations has reduced jurisdictional disputes between these two Organizations to a very minimum and this clarification is made in the hope that it may entirely eliminate any further jurisdictional misunderstandings.

(Signed) JOHN J. McCARTIN,
Special Representative.
United Association of Journeymen Plumbers and Steamfitters.

(Signed) J. A. FRANKLIN,
International President,
International Brotherhood of Boiler Makers.

March 20, 1942.

AGREEMENT

Between the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers and the International Brotherhood of Electrical Workers*

It is hereby agreed that the operators of vehicles delivering electrical material come under the jurisdiction of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers.

It is further agreed that the operators of vehicles used for electrical construction work, maintenance work or electrical repair work—that is, when such vehicles are used for transporting man or men and/or material to and from job, and said vehicle

* For full report see Case 41 of Executive Council's Annual Report, 1942.

remains at job site with man or men in the performance of electrical work, and the operation of the vehicle is an integral part of the work—such operator comes under the jurisdiction of the International Brotherhood of Electrical Workers.

It is understood and agreed that the equipment operated by electrical workers shall only be the truck carrying the line and maintenance crews, tools, etc., to and from the job, or the emergency car from electrical contracting shops carrying only tools and repair equipment for emergency work. Operation of all delivery equipment for the delivery of materials of all character, such as poles, pipes, transformers, cables, and electrical appliances, such as refrigerators, radios, etc., shall be the jurisdiction of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers.

Signed this 11th day of February, 1942.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers:

JOHN M. GILLESPIE,
General Secretary-Treasurer.

DAVE BECK,
Vice President.

International Brotherhood of Electrical Workers:

G. M. BUGNIAZET,
International Secretary.

CHARLES M. PAULSEN,
Chairman, Executive Council.

EDWARD J. BROWN,
International President.

Agreement (Pointing or Caulking Around Steel Window Sash)

Agreement entered into April 12, 1919, at Indianapolis, Ind., between the Executive Officers of the B. M. & P. I. U. and the O. P. & C. F. I. A. as follows:

"It was agreed that the pointing around steel sash on exclusive concrete shall be done by the members of the O. P. & C. F. I. A. The pointing of all steel sash where whole or part is masonry shall be done by the members of the B. M. and P. I. U."

For the O. P. & C. F. I. A.

EDWARD J. MCGIVERN, *President.*
PETER G. COOK, *First Vice-President.*
THOMAS A. SCULLY, *Secretary-Treasurer.*
W. A. O'KEEFE, *Organizer.*

For the B. M. & P. I. U.

WILLIAM J. BOWEN, *President.*
THOMAS R. PREECE, *First Vice-President.*
WILLIAM M. DOBSON, *Secretary.*

Agreement for Avoidance of Disputes Between United Slate, Tile and Composition Roofers and Sheet Metal Workers' International Association

(Endorsed by Seattle Convention, Building Trades Department, November, 1913)

DECISION RENDERED, JULY 12, 1922

In the matter of the subject referred to in the foregoing title, it is the decision of the Board that the following agreement be concurred in:

Upon that portion of the report of the Executive

Council under the above caption the committee reported as follows:

"The representatives of the Sheet Metal Workers and the Slate, Tile and Composition Roofers appeared before your committee and requested that they be given an opportunity to reach an agreement. The request was granted and the following represents the agreement reached by the trades in interest:

"This agreement made and entered into at Atlantic City, N. J., July 25, 1913, by and between the Sheet Metal Workers, party of the first part and the Slate, Tile and Composition Roofers, party of the second part, in pursuance of correspondence and action thereon as found on page 76 of the Report of the Proceedings of the Sixth Annual Convention of the Building Trades Department, whereby the party of the first part agrees to cause its affiliated local unions and their members to respect and observe the trade jurisdiction of the party of the second part as approved by the Building Trades Department of the American Federation of Labor, and refrain from doing any work granted to said party of the second part in the aforesaid jurisdiction in all towns and localities, where the party of the second part has a duly chartered local union.

"The party of the second part agrees to cause all its local unions and their members to observe and respect the jurisdiction of the party of the first part as established and approved by the Building Trades Department of the American Federation of Labor."

MEMORANDUM OF UNDERSTANDING

Between

The Operative Plasterers' and Cement Finishers' International Association

The Bricklayers, Masons and Plasterers' International Union

and

The International Hod Carriers', Building and Common Laborers' Union

1. This memorandum of understanding shall only cover the performance of work coming under the jurisdiction of either the Cement Finishers or Laborers in connection with the preparation, pouring, placing, spreading, rodding and finishing of cement or concrete on highways, roads, streets and airport runways.

2. The mixing, handling, pouring, puddling, blocking, vibrating and spreading of all concrete shall be the work of the Laborers. The setting, leveling and lining of all slab steel forms on roads, highways and streets shall be the work of the Laborers.

3. All labor on center expansion machine, all expansion and contraction joints, center strips and center steel shall be the work of the Laborers.

4. The handling of bull floats where bull float is used for strike off shall be the work of the Laborers.

5. The tending to Cement Finishers, the handling and distributing of all material on sidewalks, curbs and gutters is the work of the Laborers.

6. The setting of all forms for sidewalks, curbs

and gutters shall be the work of the Cement Finishers.

7. Straight edging, floating, trowelling, edging, rubbing and brushing shall be the work of the Cement Finishers.

8. It is understood that this memorandum is entered into for the purpose of clarifying jurisdiction as outlined above and in the event of any dispute arising in connection with the work as outlined above, the said dispute shall be referred to the General Presidents of the International Unions parties hereto. In the event of any dispute arising on any work not covered by this agreement such as bridges, viaducts and underpasses, the said dispute shall be immediately referred to the General Presidents of the International Unions involved, or to whomever the said General Presidents may assign, for the purpose of attempting to adjust the said dispute amicably. During the period of time that these attempts are being made for adjustment there shall be no stoppage of work on the job.

Operative Plasterers' and Cement Finishers' International Association:

JOHN E. ROONEY, *President.*

JOHN J. HAUCK, *First Vice President.*

Bricklayers, Masons and Plasterers' International Union:

HARRY C. BATES, *President.*

A. J. CLELAND.

International Hod Carriers', Building and Common Laborers' Union of America:

JOS. V. MORESCHI, *General President.*

JOHN W. GARVEY.

July 19, 1948

Attested: RICHARD J. GRAY,
President, Building and Construction Trades Department, AFL.

AGREEMENT UNDER NATIONAL JOINT BOARD FOR SETTLEMENT OF JURISDICTIONAL DISPUTES, BUILDING AND CONSTRUCTION INDUSTRY

We the undersigned request that Joint Board No. 1 be discharged. "The issue in dispute is the laying of wood fibre conduit underground for the carrying of electrical wires and cables."

It is agreed that this work is the work of the International Brotherhood of Electrical Workers.

Signed this 13th day of July, 1948.

International Hod Carriers', Building and Common Laborers' Union of America: JOS. V. MORESCHI,
General President.

International Brotherhood of Electrical Workers: D. W. TRACY,
International President.

Attested: RICHARD J. GRAY,
President of the Building and Construction Trades Dept., A. F. of L.

Iron Workers—Elevator Constructors Directional Elevators

AGREEMENT

May, 26, 1953

For the purpose of establishing complete harmony and cooperation on the erection of two directional elevators for the Bowser Engineering

Company in various parts of the country, the International Association of Bridge, Structural and Ornamental Iron Workers, and the International Union of Elevator Constructors, hereby enter into the following agreement, effective on and from June 1, 1953.

One team of elevator constructors to not less than two iron workers while installing the following: 1—crane rails, 2—crane bridges, 3—hoisting of all elevator equipment necessary to be in place before pent house roof is poured, 4—optional hoisting of crane drives, 5—all hatchway steel that replaces normal elevator hatchways, 6—catwalks, platforms, stairways and ladders.

The Bowser Engineering Company agrees to pay iron workers the regular wage scale in the jurisdiction of the Local Union in which the project is located plus 25 cents per hour to one iron worker who acts as foreman under the supervision of the elevator mechanic on the job.

Signed for International Association of Bridge, Structural & Ornamental Iron Workers:

JOHN L. MCCARTHY, *Gen. Vice President.*

Signed for International Union of Elevator Constructors:

J. A. ALTMAN, *Reg. Business Representative.*

Attested July 10, 1953

JOHN T. DUNLOP, *Chairman*
National Joint Board.

Boilermakers-Ironworkers

"September 23, 1953

The undersigned representatives of the International Association of Bridge, Structural and Ornamental Iron Workers and the International Brotherhood of Boilermakers, Iron Shipbuilders,

Blacksmiths, Forgers and Helpers recommend to the respective General Presidents the attached agreement for the settlement of jurisdictional disputes between the two organizations.

(Signed) J. R. DOWNES,
International Association of Bridge, Structural and Ornamental Iron Workers

(Signed) J. P. MCCOLLUM,
International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmith, Forgers and Helpers."

September 23, 1953

Memorandum of Agreement

This memorandum of agreement between the International Association of Bridge, Structural and Ornamental Iron Workers and the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers supplements and interprets the agreement of October 15, 1928 between the two organizations and the decision of record of May 19, 1947.

It is the purpose of this agreement to improve relations between the two trades, to eliminate work stoppages which are costly to the membership of both organizations and to the industry, to settle jurisdictional disputes directly between the two trades, and mutually to assist each union to secure work coming within its recognized jurisdiction. In order to achieve these objectives, it is mandatory upon the membership of local unions affiliated with both International Unions to comply with the provisions of this memorandum of agreement.

It is expressly understood and agreed that this agreement shall not relate to or have any bearing

on jurisdictional disputes that may exist or in the future occur, between either of the parties hereto with any other International Union or subordinate body thereof.

1. WIRE MESH. Wire mesh when attached or welded directly to the breeching, stacks or vessels shall be installed by Boilermakers, and wire mesh when attached or fastened to lugs, clips, bolts, nuts or any other attachments (which have already been attached or welded to the breeching, stacks or vessels by Boilermakers) shall be installed by Iron Workers.

2. DERRICKS. Where a derrick is used by both crafts, one craft shall erect and the other craft shall dismantle same. Where such derrick is used only by one of the crafts, then that craft shall erect and dismantle same.

3. PRECIPITATORS. Plate work and buckstays and internals shall be the work of the members of the Boilermakers; structural supports shall be the work of the Iron Workers including the house roof. Roof supports or lugs attaching directly to the precipitator shell shall be the work of the Boilermakers. When roof supports attach to lugs, the Boilermakers shall weld the lug to the precipitator shell and the Iron Workers shall erect the roof supports thereto.

4. OVERHEAD SUPPORTING STEEL FOR STEAM GENERATORS

(a) The erection of structural members, which may be channels, beams or angles, and which are directly attached to and suspended from the building roof steel for the purpose of supporting the steam generating unit shall be the work of the Iron Workers.

(b) The erection of all rods or other steel mem-

bers, attached to the members described in paragraph (a), and used for the purpose of supporting tubes and other Boilermakers' work, shall be performed by the Boilermakers.

5. THE ERECTION AND REPAIR OF BLAST FURNACES

The following work items shall be erected and installed by the Iron Workers:

Foundation rod and bands
Column bases and columns
Main, top furnace platform (exept supports which weld, or rivet to shell)
Top super-structure
Bell trolley
Bell beams
Bell cables
Jib-crane and mast
All top mechanism such as large bell, small bell, bell rods, large bell hopper, gas seal hood, distributor, revolving hopper, receiving hopper and small bell seat
Skip bridge
Skip cars and cables
Skip operating mechanism such as skip hoist, large and small bell cylinders
Cast house structural steel and roof
Skip house
Skip bridge A-frame
Iron and cinder runners and cast house auxiliaries
Trestle and stock house parts such as coke, stone and ore bins
Coke and ore chutes
Scale car and larry cars
Pug mill machinery
Elevator shafts

The following work items shall be erected an installed by the Boilermakers:

Hearth jacket
Hearth coolers
Tuyere jacket
Blast furnace shell
Bustle pipe
Furnace top ring and dome
Offtakes—Uptakes
Downcomers and attached wearing plates
Bleeder pipe, valves and stack
Bosh band
Dust catcher
Hot blast stoves
Hot blast valves and castings
Gas washer
Gas mains
Gas precipitators
Cold blast main and mixer line
Stove stacks
Dust legs
Hot ladle cars
Support for main top furnace platform whic weld or rivet to shell
Stock line brackets and abrasion or wearin plates
Tuyere stocks

6. CATWALKS, PLATFORMS, STAIRWAY AND LADDERS

(a) Catwalks, platforms, stairways, and ladde erected on storage tanks for liquid or gas, an processing tanks erected by the Boilermakers, an installations commonly referred to as tank farm shall be performed by Boilermakers.

(b) Catwalks, platforms, stairways and ladde

supported exclusively by a pressure vessel, such as a bubble or fractionating vessel, shall be erected by Boilermakers.

(c) Catwalks, platforms, stairways, and ladders supported by structural steel supports shall be erected by Ironworkers. When supported by both the pressure vessel and structural steel supports, the erection of the catwalks, platforms, stairways and ladders shall be performed by Iron Workers, except that the welding or attaching of the lug or support directly to the pressure vessel shall be performed by Boilermakers.

(d) Catwalks, platforms, stairways, and ladders in connection with blast furnace construction shall be performed as follows:

(i) The Boilermakers shall attach the lugs or supports directly to the shell of the blast furnace and the Iron Workers shall then erect the catwalks, platforms, stairways, and ladders.

(ii) The erection of catwalks, ladders and stairways on hot stoves and precipitators in connection with the blast furnace construction, in accordance with paragraph (b) of this section, shall be erected by Boilermakers. The erection of the platforms and bridgeways across the top of hot stoves, however, shall be erected by iron workers, except that the welding or attaching of the lugs or supports directly to the hot stove shall be performed by Boilermakers.

7. FORCED AND INDUCED DRAFT FANS. The erection of forced and induced draft fans in connection with the construction of steam generating installations, which come in completed units, shall be performed by Iron Workers. Attachments to the ducts and breeching shall be performed by Boilermakers. On forced and induced draft fans,

which come knocked down, the Iron Worker shall erect and install the pedestal and rotor and the Boilermakers shall erect and install the fan housing.

8. PROCEDURES.

(a) The General President of each organization will designate a representative to be assigned to adjust directly all disputes between the two trades which can not be adjusted at the local level.

(b) Committees designated by the respective General Presidents shall meet periodically to review work covered by this agreement and to consider new problems which arise in order to adjust same.

(c) Installations in process on the date of this agreement shall be completed in accordance with the existing assignments or ruling of the National Joint Board.

International Association of Bridge, Structural and Ornamental Iron Workers

St. Louis, Missouri.

(Signed) J. H. LYONS,
General President

(Signed) J. R. DOWNES,
General Secretary

Approved Nov. 2, 1953,
General Executive Council.

International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers

Kansas City, Kansas.

(Signed) CHAS. J. MACGOWAN,
International President.

(Signed) WM. J. BUCKLEY,
International Sec.-Treas.

Approved Nov. 5, 1953,
International Executive Council.

Straight Telegram

St. Louis, Mo., November 2, 1953.

Charles J. MacGowan, International President
International Brotherhood of Boiler Makers, Iron Ship Builders and Helpers of America
New Brotherhood Building
Kansas City, Kansas

This is to notify you that the Executive Council of the International Association of Bridge, Structural and Ornamental Iron Workers at its meeting today unanimously ratified and adopted the memorandum of agreement dated September 23, 1953, which supplements and interprets the agreement of October 15, 1928, between our two respective organizations as well as decision of record of May 19, 1947.

JOHN H. LYONS, *General President.*

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers

November 10, 1953.
File: 12(i)-1(c)

Mr. J. H. Lyons, President
Intl. Bridge & Structural Iron Workers
Ste. 300, Continental Building
3615 Olive Street
St. Louis, Missouri

Dear Sir and Brother:

Under date of November 6, 1953, I wired you as follows:

"This is to officially notify you that our International Executive Council after devoting a full day to the discussion of the proposed memorandum of agreement dated September 23, 1953, which implements and interprets the agreement of October 15, 1928, finally approved same by a

unanimous vote of the Executive Council. However in the discussion it developed that one or two minor clarifications may be necessary in order to avoid future misunderstandings by our respective memberships. These clarifications will in no sense alter the purpose of the memorandum of September 23, but will in truth and in fact be clarifications only. I shall write you the details of the same next week. I am furnishing John Dunlop with a copy of this telegram."

Now, Brother Lyons, it is needless for me to say that the discussions in our International Executive Council were long and earnest over the question of approving the proposed supplementary agreement. While it was finally adopted by a unanimous vote, it was the feeling of the International Executive Council that there was one principle involved which should be protected, from our standpoint, and there were at least two additional clarifications which should be incorporated in order to make the understanding as effective as possible.

The principle to which I refer was the question of our craft deviating from our historic position that all vessels requiring tight joints must be the work of the Boilermakers and the allotment of the bells in blast furnaces to any other trade was a departure from our traditional policy. I assure you it was not the amount of work involved which caused us our difficulty, but rather the principle of a "tight joint." However, in our earnest desire to reach a peaceful understanding between the two International Unions, we accepted the assignment of bells, but with the hope that the two Internationals could agree to an interpretation to be added as a footnote to the first portion of section 5.

captioned, "The Erection and Repair of Blast Furnaces," this footnote to read substantially as follows:

> "It is mutually agreed between the two International Unions that the awarding of the blast furnace bells to the Structural Iron Workers is without prejudice to the Boilermakers' historic claims over all vessels requiring tight joints."

In the second portion of section 5, which is the Boilermakers' list of work, it occurred to us that the negotiators unintentionally overlooked the word "mantle" and if it is agreeable to all parties, we would request that the word "mantle" be inserted in the proper place in the list of work awarded to the Boilermakers.

Returning to section 4, captioned, "Overhead Supporting Steel for Steam Generators," it was the opinion of our International Executive Council that while the intent of the two organizations is covered in this section, it was our feeling that in order to avoid future disputes, the language needs clarifying, particularly where in sub-section (a) (Iron Workers' section), the words "for the purpose of supporting the steam generating unit" and in subsection (b) (Boilermakers' section), the words ". . . used for the purpose of supporting tubes and other Boilermakers' work . . ." might be interpreted in such a manner as to cause confusion because, after all, the complete boiler is still a steam generating unit from the standpoint of the Boilermaker and tubes are but a part of the steam generating unit. It is our suggestion that after the words "Boilermakers' work" in the third line of section 4 (b), the words "which are a part of the steam generating unit" be added so that the whole section will read:

"The erection of all rods or other steel members, attached to the members described in paragraph (a), and used for the purpose of supporting tubes and other Boilermakers' work, which are a part of the steam generating unit, shall be performed by the Boilermakers."

If it is agreeable with you, I would suggest that Secretary Downes and Vice President McCollum have a further meeting and see if it is not possible to work out these suggestions, which, I repeat again, are not intended to change the intent of the agreement in any manner other than to clarify it to avoid confusion.

With best wishes, I am

Fraternally yours,
CHARLES J. MACGOWAN,
International President.

CJM:CW
cc: John Dunlop
cc: J. R. Downes
cc: J. P. McCollum
OEIU No. 4-AFL

International Association of Bridge, Structural and Ornamental Iron Workers

January 9, 1954.

Mr. J. P. McCollum, Vice President
International Brotherhood of Boilermakers,
Iron Ship Builders, Blacksmiths, Forgers
and Helpers
New Brotherhood Building
Kansas City 11, Kansas

Dear Sir and Brother:

The correspondence dated November 10, 1953, directed by Charles J. MacGowan, International President of the Brotherhood of Boilermakers, to J. H. Lyons, General President of this International Association, as well as the correspondence

dated November 13, 1953, from General President Lyons to International President Charles J. MacGowan, has been reviewed by the writer.

It is the opinion of the officials of this International Association that the suggestions outlined by President MacGowan warrant consideration and that, for the purpose of clarification, further understandings should be developed.

Inasmuch as the "Memorandum of Agreement" dated September 23, 1953—and signed by yourself and the writer—has been ratified by the International Executive Council of the Brotherhood of Boilermakers, and the General Executive Council of this International Association, it is our opinion that no change should be made in this document as such action would require further ratification from the Executive Councils of both organizations.

It is agreeable to the officials of this International Association that the following clarifications will be stipulated:

"It is mutually agreed between the two International Unions that the awarding of the blast furnace bells to the Structural Iron Workers is without prejudice to the Boilermakers' historic claims over all vessels requiring tight joints."

It is also understood that the work item "mantle" should be included in the Boilermakers' division of Section 5 of the "Memorandum of Agreement."

It shall be understood that the meaning of Section 4, Paragraph (b) of the "Memorandum of Agreement"—captioned OVERHEAD SUPPORTING STEEL FOR STEAM GENERATORS—shall be as follows:—

"The erection of all rods and other steel members, attached to the members described

in Paragraph (a) and used for the purpose of supporting tubes and other Boilermaker's work, which are a part of the steam generating unit, shall be performed by the Boilermakers."

I believe that confirmation of these clarifications by International President Charles J. MacGowan and General President J. H. Lyons, as well as yourself and the writer, would be sufficient and thereby eliminate any need to reopen the present "Memorandum of Agreement" as ratified by both International Unions.

I am, with best wishes

Fraternally yours,

J. R. DOWNES,
General Secretary.

JRD:HB

January 18, 1954

R. J. Gray, President
Building & Construction Trades Department
American Federation of Labor
Washington, D. C.

Dear Mr. Gray:

I am advised that you have received the agreement signed by President J. H. Lyons and President Charles J. MacGowan, dated January 12, 1954 an identical communication which was sent to the National Joint Board.

In accordance with Article III, Section 2 of the Agreement creating the Joint Board, I hereby attest to this agreement.

It is my understanding that the two organizations intend to print the agreement in convenient form in the near future.

Very truly yours,

(Signed) JOHN T. DUNLOP
Chairman
National Joint Board

JTD:thw

September 13, 1954

Wm. J. McSorley, General President
Wood, Wire and Metal Lathers International Union

Ambassador Hotel
Los Angeles, Calif.

Dear Sir and Brother:

At your request and in order to avoid any misunderstandings with the Wood, Wire and Metal Lathers International Union, the undersigned wish to advise that Section 1, captioned "Wire Mesh" of the Memorandum of Agreement dated September 23, 1953, entered into between the International Association of Bridge, Structural and Ornamental Iron Workers and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers is not intended and does not apply to the erection of light iron furring or metal lath used to receive plaster.

Fraternally yours,

(Signed) WM. A. CALVIN,
International President,
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers

(Signed) J. H. LYONS,
General President,
International Association of Bridge, Structural and Ornamental Iron Workers

January 28, 1954

AGREEMENT BETWEEN THE INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS AND THE BRICKLAYERS, MASONS AND PLASTERERS' INTERNATIONAL UNION OF AMERICA.

(1) This agreement covers the installation and application of all insulating materials on boiler wall construction.

(2) In the application of insulating materials over the boiler walls after same is completed, when said insulation is applied in one continuous operation and not in conjunction with the refractory material, this is the work of members of the International Association of Heat and Frost Insulators and Asbestos Workers.

(3) In cases where the insulation on the outside of the boiler walls is applied in conjunction with refractory materials as it progresses (scaffold high), said insulation is the work of members of the Bricklayers, Masons and Plasterers' International Union of America.

(4) In the event that a dispute over the application of this agreement cannot be settled locally, there shall be no stoppage of work, and the dispute

shall be referred to the headquarters of both International Unions for settlement.

International Association of Heat and Frost Insulators and Asbestos Workers:

(Signed) JOSEPH A. MULLANEY.
HUGH E. MULLIGAN.
C. W. SICKLES.

Bricklayers, Masons and Plasterers' International Union of America:

(Signed) HARRY C. BATES.
JOHN J. MURPHY.
THOMAS F. MURPHY.
A. J. CLELAND.

Attested:

JOHN T. DUNLOP, Chairman,
National Joint Board for Settlement
of Jurisdictional Disputes.

Feburary 2, 1954.

DECISION OF AMERICAN FEDERATION OF LABOR IN RE ISSUANCE OF CHARTER TO ELEVATOR CONSTRUCTORS' INTERNATIONAL UNION.

WASHINGTON, D. C. May 9, 1904.

MR. HENRY SNOW, *Gen. Secy.-Treas.*
International Union of Elevator Constructors.
40 Park Avenue, Chicago, Ill.

Dear Sir and Brother:

Today, Brothers Feeney and Havenstrite, of your organization, called at this office and requested a definite statement regarding matters of jurisdiction of your International Union.

Of course, you are aware that the same subject was under discussion at the Denver meeting of the Executive Council of the American Federation of Labor held last month.

Desirous of rendering the very best possible service I can to your organization, consistent with the rights to which all other organizations are entitled I therefore beg to say that at the time when your organization applied for charter, from the American Federation of Labor, the following claims to work were embodied in your application:

"The assembling of all elevator machinery, to wit: Hydraulic steam, electric, belt and compressed air; also assembling and building escalators, or traveling stairways; the assembling of all cars complete; putting up all guides, either of wood or iron; the setting of all tanks, whether pressure, open or pit tanks; the setting of all pumps (where pumps arrive on job in parts, they are to be assembled by

members of this union). All electric work connected with car machinery and hoisting, including bells, annunciators and lights; all overhead work, either of wood or iron, and supports for the same when required; the setting of all templets, all indicators; all foundations, either of wood or iron, that would take the place of masonry; the assembling of all hydraulic parts in connection with elevators; all locking devices in connection with elevators; the boring, drilling and sinking of all plunger elevators; all link belt carriers, and all work in general pertaining to the erection and equipment of an elevator complete."

Prior to issuance of the charter to your organization, claims to jurisdiction were made by several organizations of some classes of work which were not allowed. Then an agreement was reached between the representatives of the International Union of Elevator Constructors and the International Brotherhood of Electrical Workers, by which your organization yielded to the electrical workers the following classes of work: "The electrical work on flashlights, electrical annunciators and lamps, and feed wires to the controller." With that reservation, and with those claims made by your organization to jurisdiction, the charter was issued by the American Federation of Labor.

Fraternally yours,

(Signed) SAMUEL GOMPERS,
President American Federation of Labor

DECISION OF THE AMERICAN FEDERATION OF LABOR IN RE JURISDICTION OF ENGINEERS.

(Decision Norfolk, Va., Convention, American Federation of Labor, November 11-23, 1907, Resolution No. 124.)

Resolved, That hoisting and portable local unions of the International Union of Steam Engineers have jurisdiction over the motive power of all derricks, cement-mixers, hod-hoists, pumps, and other machines used on construction work and be it further

Resolved, That the Building Trades organizations be requested to give all the assistance possible to the Hoisting and Portable Locals of the I. U. S. E. in maintaining the scale of wages now paid on this work.

This shall not, however, be construed as preventing the International Brotherhood of Electrical Workers from using a hand or electric winch for the purpose of pulling wire or cable through conduits, nor the wiring and repairing of all electrical appliances.

DECISION OF AMERICAN FEDERATION OF LABOR ELECTRICAL WORKERS—ENGINEERS.

(Decision Cincinnati, Ohio, Convention, American Federation of Labor, June 1922.)

That the electrical installation, electrical repairs, overhauling of general electrical apparatus in generating stations, substations and the operating of exclusively electrical-driven machines in the aforementioned plants or stations also that the operation

of traveling or other electric cranes for shop or factory purposes shall be Electrical Workers work.

"This decision is not to interfere with the jurisdiction of the Steam and Operating Engineers over operating steam-generating plants, electric hoists in building construction or electric shovels.

"These conclusions are not intended to disturb any other conditions obtained that are mutually satisfactory at this time, or that have been provided for by past action of the American Federation of Labor which are not in conflict with this decision."

DECISION OF AMERICAN FEDERATION OF LABOR IN RE DISPUTE BETWEEN TEAMSTERS AND IRON WORKERS.

The following is a decision of jurisdiction dispute existing between the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, and the Bridge and Structural Iron Workers' International Union, rendered by an Arbitration Committee appointed by the Executive Council and adopted by the Convention of the American Federation of Labor held in Portland, Oreg., October, 1923:

"It is clearly evident that the Bridge and Structural Iron Workers' International Union has gradually and persistently encroached upon the jurisdiction of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America. It has constantly endeavored to broaden the jurisdiction by claiming, and in some instances practicing the rights to load and unload materials off and on wagons, trucks and automobiles. In the opinion of the Committee, this work clearly belongs to the International Brotherhood of Teamsters, Chauf-

feurs, Stablemen and Helpers of America. This work was conceded to this organization through its charter of affiliation with the A. F. of L. All loading, hauling and unloading of materials on and off wagons, trucks and automobiles belong to the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America. However, where building material is hauled to buildings under construction and the foreman, contractor, or person in charge of the erection of the building, directs that it be hoisted from the wagon, truck or automobile, such hoisting shall be done by the members of the Bridge and Structural Iron Workers' International organization. Where it is loaded from the wagon, truck or automobile on the ground, street or sidewalk, such work shall be done by the members of the Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America."

DECISION OF AMERICAN FEDERATION OF LABOR IN RE ERECTION OF ECONOMIZERS.

(Decision El Paso, Tex., Convention, American Federation of Labor, November 17-25, 1924.)

In the controversy existing between the Brotherhood of Boiler Makers and the United Association of Plumbers and Steam Fitters over the erection of economizers, the decision is that in the opinion of the Executive Council the work belongs to the United Association of Plumbers and Steam Fitters.

United Association of Journeymen Plumbers and Steamfitters

By the decisions of the American Federation of Labor, rendered at both the Atlanta and Rochester

conventions, the substance of this action of these conventions of the American Federation of Labor was that there was only room for one organization in the pipefitting industry. And, that the United Association of Journeymen Plumbers and Steamfitters is recognized as the only organization having complete control of the pipefitting trade and industry in its entirety throughout the United States and Canada.

Following are the official decisions of the American Federation of Labor:

Atlanta Decision

The Atlanta Convention of the American Federation of Labor, held in Atlanta, Ga., November 13 to 25, inclusive, 1911, declared "that both for harmony and practicability the pipefitting trade should be represented in the American Federation of Labor, also in the Building Trades Department, by one general association of the pipefitting industry, namely the United Association of Plumbers, Gas Fitters, Steamfitters and Steamfitters' Helpers of the United States and Canada, and further, that the Executive Council of the Building Trades Department be requested to carry that declaration into effect." (See page 339 of the 1912 Rochester Convention proceedings.)

Rochester Decision

The Adjustment Committee's report to the delegates assembled at the Rochester Convention of the American Federation of Labor, held at Rochester, N. Y., November 11 to 23, inclusive, 1912, is as follows:

Your committee reports that it has considered carefully the efforts made by the Executive Coun-

cil of the American Federation of Labor to carry out and make effective the instructions of the Atlanta Convention, which declared that both for harmony and practicability the pipefitting trade should be represented in the American Federation of Labor, also in the Building Trades Department, by one general association of the pipefitting industry, namely, the United Association of Plumbers, Gas Fitters, Steamfitters and Steamfitters' Helpers of the United States and Canada.

DECISIONS RENDERED BY THE NATIONAL BOARD FOR JURISDICTIONAL AWARDS IN THE BUILDING INDUSTRY.

Air Coolers, Air Washers and Blowers, Consisting of the Assembling of Sheet Metal and Pipe Fitting

DECISION RENDERED MARCH 11, 1920

(Subject of dispute between the Amalgamated Sheet Metal Workers' International Alliance and the United Association of Plumbers and Steamfitters.)

The following agreement between the Amalgamated Sheet Metal Workers' International Alliance and the United Association of Plumbers and Steamfitters was confirmed:

September 9, 1918.

The undersigned committee, appointed by the General Presidents of their respective International Organizations namely, the United Association of Plumbers, Steamfitters and Steamfitters' Helpers and the Amalgamated Sheet Metal Workers' International Alliance, held joint conferences in the City of New York, beginning September 5, 1918, in an endeavor to arrive at an agreement concerning air washers, fans, blowers, the housing of same, and the pipe fitting on same.

After lengthy meetings participated in by all of the undersigned, representing the Joint Conference Committee of both International Unions, the following has been agreed to:

SECTION 1. That all sheet metal work of No. 10

gauge, or lighter, when used in air washers, fans, blowers, or on the housing of same, shall be recognized as being the work of the members of the Amalgamated Sheet Metal Workers' International Alliance.

SEC. 2. That all pipe fitting in connection with the above first section shall be recognized as being the work of the Steamfitters, members of the United Association of Journeymen Plumbers, Steamfitters and Steamfitters' Helpers.

SEC. 3. It being thoroughly understood by all of the undersigned that all the assembling and erecting of the work as defined in Section One, shall be the work of the members of the Sheet Metal Workers' International Alliance, excepting pipe fitting of all kinds, which shall be the work of the Steamfitters and Steamfitters' Helpers of the United Association.

SEC. 4. This agreement shall become effective and in full operation for all parties concerned beginning November 1, 1918.

Signed for Sheet Metal Workers this 9th day of September, 1918:

JAMES LENNON, *Gen. Org.*,
R. PATTISON, *Chairman*,
W. M. O'BRIAN, *Secretary*,
WM. H. LYONS,
THOS. WALSH,
EDW. P. O'NEIL.

Signed for United Association:

E. W. LEONARD, *Gen. Org.*,
CHARLES M. RAU,
RICHARD P. WALSH,
A. P. JOHNSON,
LEO A. MURPHY.

Low Pressure Heat

(Subject of dispute between the United Association of Plumbers and Steamfitters and the International Union of Steam Engineers in the Matter of maintaining temporary heat while structure is in course of construction.)

DECISION RENDERED MARCH 11, 1920

In the matter of the controversy between the engineer and steamfitter on the question of low pressure heat during completion of the heating system jurisdiction shall rest with the steamfitters until the initial test is completed, immediately after which time, whenever necessary to maintain heat, a stationary engineer shall be employed either by the contractor or the owner.

Low Pressure Heat (Rehearing)

(Subject of dispute between International Union of Steam Engineers and United Association of Journeymen Plumbers and Steamfitters.)

DECISION RENDERED AUGUST 2, 1923

In the matter of the controversy between the engineers and steamfitters on the question of low pressure heat during the completion of the heating system while the building is under construction, jurisdiction shall rest with the steamfitters until the general test has been made and the work accepted by the owner or his agent.

Pipe Railing or Guards for Enclosures, Stairways, Hatches, etc.

(Subject of dispute between the Bridge and Structural Iron Workers' International Association and the United Association of Plumbers and Steamfitters. Claimed by the Iron Workers entirely except when not used as a conduit for fluids or vapors claimed by Plumbers and Steamfitters when of standard-sized cut and threaded pipe.)

DECISION RENDERED MARCH 11, 1920

Pipe railing consisting of standard-size cut and threaded pipe, not used in connection with structural or ornamental iron work, is awarded to Plumbers and Steamfitters.

INTERPRETATION RENDERED SEPTEMBER 15, 1920

"Iron pipe railing consisting of a preponderance of slip-joints made rigid with or without set-screws, pinions or rivets, supported by a threaded joint and flange at base or walls, is the work of the Iron Workers. Where, however, the preponderance of joints is of standard-sized cut and threaded iron pipe, it belongs to the Plumbers and Steamfitters."

Re-enforced Concrete, Cement and Floor Construction

(Subject of dispute between the Bridge and Structural Iron Workers' International Association and the Wood, Wire and Metal Lathers' International Union.)

DECISION RENDERED MARCH 11, 1920

In the matter of the controversy between the Iron Workers and Lathers over re-enforced concrete construction, it is decided that all iron and steel used for re-enforcement in re-enforced concrete, cement and floor construction be awarded to the Iron Workers.

In such cities and localities as are covered by existing agreements with employers awarding Lathers control over re-enforced concrete construction, these agreements are to be maintained inviolate until the date of their expiration, after which this decision shall prevail.

INTERPRETATION RENDERED DECEMBER 4, 1920.

In the interpretation of this Board's decision of March 11, 1920, in the matter of the controversy between the Iron Workers and Lathers over reenforced concrete construction, it is not to be understood as abrogating, setting aside or in any way altering the decision of the Rochester Convention of the Building Trades Department, November 29, 1912, awarding jurisdiction over Hy-rib Lath to the Lathers, and it is to be understood that the placing of Hy-rib Lath or any ribbed metal lath, however it may be used, comes within the jurisdiction of the Lathers.

Vitrolite and Similar Opaque Glass

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union and the Brotherhood of Painters, Decorators and Paperhangers.)

DECISION RENDERED MARCH 11, 1920

That in the matter of the controversy between the Painters and Bricklayers on the subject herewith referred to, jurisdiction over the setting of vitrolite and similar opaque glass is awarded to the Bricklayers.

Vitrolite and Similar Opaque Glass (Rehearing)

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union and the Brotherhood of Painters, Decorators and Paperhangers.)

DECISION RENDERED MAY 26, 1924

It is the opinion of the Board that the foregoing decision of March 11, 1920, is intended to convey to the Bricklayers all counters and lavatories constructed of vitrolite or carrara glass and such glass when used in mural decorations on buildings in

place of marble or other stone or used in conjunction with marble or other stone as panels on counters.

It is the further opinion of the Board that the foregoing decision is intended to convey all vitrolite, opalite, white opal and other opaque glass installed on false work, furring strips, walls, ceilings, partitions or columns, secured with screw rosettes, molding, putty, expansion, toggle bolts or screws, to the Painters.

The agreement of December 5, 1910, which was concurred in by the Board of Awards on July 12, 1922, remains in effect, and any disputes that may arise in connection with the subject of the agreement with the Board's decisions shall be adjusted in accordance with the provisions contained in Sections 3 and 4 of the agreement.

Asbestos Plaster for Boiler Rooms, etc.

(Subject of dispute between the Operative Plasterers and Cement Finishers' International Association and the International Association of Heat and Frost Insulators and Asbestos Workers.)

DECISION RENDERED APRIL 28, 1920

In the dispute between the Asbestos Workers and Plasterers on the matter of plastering boiler rooms, etc., it is decided that the insulation and finishing coat on ceilings with asbestos and other insulating material, where the groundwork has been prepared and installed by the Asbestos Workers, shall, including the application of insulating material on boilers, tanks, vats, etc., be awarded to the Asbestos Worker.

Light Iron Furring, Brackets, Clips, Hangers, Corner Guards, Beads and Metallic Lath

(Subject of dispute between the International Union of Wood, Wire and Metal Lathers and the International Association of

Bridge and Structural Iron Workers.)

(Award of the Denver Convention, Building Trades Department, A. F. of L., adopted November, 1908. See printed proceedings, Pages 69 to 71, inclusive.)

DECISION RENDERED APRIL 28, 1920

In the matter of dispute between the International Union of Wood, Wire and Metal Lathers and the International Association of Bridge and Structural Iron Workers referred to in the foregoing title, the following award is concurred in:

"After going into an extended hearing of the jurisdiction claims of both organizations, your committee recommends that the erection and installation of all light iron work, such as light iron furring, brackets, clips, hangers, steel corner guards or beads,* and metallic lathing of all descriptions belong solely to the Lathers.

"This does not give the right, however, to the Lathers to install or erect any other iron work than as herein specified and outlined.

"This decision is based in conformity with the agreement entered into by the national officers of both organizations and endorsed by the Kansas City Convention of Structural Iron Workers and concurred in by the American Federation of Labor."

Hy-Rib Lath

In supplement of the foregoing decision the Rochester Convention of the Building Trades Department, November 29, 1912, awarded jurisdiction over Hy-rib Lath to the Lathers.

(Note interpretation rendered December 4, 1920, re-enforced Concrete, Cement and Floor Construction.)

* Note the following decision.

Metallic Corner Beads When Set in Plastic Material

(Subject of dispute between the Operative Plasterers and Cement Finishers' International Association and the Wood, Wire and Metal Lathers' International Union.)

DECISION RENDERED MARCH 11, 1920

In the matter of the controversy between the Plasterers and Lathers on the question of the adherence of corner beads by plastic material, it is the opinion of the Board that deserved consideration was not given the subject when the previous decision was reached. It is therefore agreed that the Plasterers are awarded jurisdiction over sticking with plastic material metallic corner beads.

Acetylene and Electric Welding

(Subject of dispute between the trades named in the following memorandum.)

DECISION RENDERED APRIL 28, 1920

In the matter of the dispute referred to in the foregoing title, as approved by the Philadelphia Convention of the Building Trades Department, A. F. of L. November, 1914 (see printed proceedings, Page 99), the following agreement is concurred in:

"Representatives of the Electrical Workers, Sheet Metal Workers, Iron Workers, Plumbers and Steamfitters, and Machinists mutually agreed to the following decision:

"Each trade to have jurisdiction over all acetylene and electric welding when such process is used to perform the work of their respective trades."

Bronzing and Painting of Radiators and Pipe Connections

(Subject of dispute between the Brotherhood of Painters, Decorators and Paperhangers and the United Associtaion of Plumbers and Steamfitters.)

(Award of Rochester Convention, Building Trades Department, A. F. of L., adopted November 29, 1912. See Page 141, printed proceedings.)

DECISION RENDERED APRIL 28, 1920

In the matter of the subject referred to in the foregoing title, the following award is concurred in:

Resolved, That the United Association of Plumbers and Steamfitters be and is instructed to require that its affiliated unions desist from further trespass upon the jurisdiction of the Brotherhood of Painters, Decorators and Paperhangers of America, and when and where necessary to notify their employers that neither journeymen nor helpers will be permitted to do this work.

Application of Damp-Resisting Preparations and Waterproofing

(Subject of dispute between United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association and the Brotherhood of Painters, Decorators and Paperhangers.)

DECISION RENDERED APRIL 28, 1920

In the matter of dispute referred to in the foregoing title, the following agreement is concurred in:

Agreement entered into by and between the Brotherhood of Painters, Decorators and Paperhangers of America and the United Slate Tile and Composition Roofers, Damp and Waterproof Workers' Association.

First. That the Painters do not claim the right to apply any of the material claimed by the Slate, Tile and Composition Roofers, Damp and Waterproof Workers, except such material as is applied by a brush that is ordinarily used by the Painters in applying the materials covered in their jurisdiction.

Second. That the Slate, Tile and Composition Roofers, Damp and Waterproof Workers do not claim the right to apply any of the material in dispute except when applied by or with a three-knot, long-handled brush, mop or swab, and spray system employed therein.

Erection of Scaffolds as Applied to Building Construction

(Subject of dispute between the International Hod Carriers', Building and Common Laborers' Union, United Brotherhood of Carpenters and Joinerss, Operative Plasterers and Cement Finishers' International Association and Bricklayers, Masons and Plasterers' International Union.)

DECISION RENDERED APRIL 28, 1920

In the matter of the dispute between the Laborers, Bricklayers, Plasterers and Carpenters over the erection of scaffolds as applied to building construction, it is agreed that the erection and removal of all scaffolds, including trestles and horses used primarily by Lathers, Plasterers, Bricklayers and Masons, shall be done by the mechanics and laborers in these trades as directed by the employer.

Self-supporting scaffolds over fourteen feet in height or any special designed scaffolds or those built for special purposes shall be built by the Carpenters.

The making of horses and trestles other than temporary is the work of the Carpenter.

Marble and Slate Partitions, Backs and Floor Slabs for Urinal Stalls, Closets, and Showers, Setting of

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union and the United Association of Plumbers and Steamfitters.)

(Award of Rochester Convention, Building Trades Department,

A.F. of L. adopted November 28, 1912. See Page 132, printed proceedings. Award of Buffalo Convention, November 9, 1917. See Page 92, printed proceedings.)

DECISION RENDERED APRIL 28, 1920

In the matter of the subject referred to in the foregoing title, the following award is concurred in:

Resolved, That the setting of floor slabs, backs, partitions of urinal stalls, closets and shower baths properly belong to the Bricklayers.

The foregoing decision does not concede to the Bricklayers the right to install marble work that is connected with the water supply or sewer or watertight work regularly catalogued as plumbing fixtures.

Muslin and Canvas for Decorative Purposes, Tacking of

(Subject of dispute between the Brotherhood of Painters, Decorators and Paperhangers and the I. A. Heat and Frost Insulators and Asbestos Workers.)

(Award of Buffalo Convention, Building Trades Department, A. F. of L., adopted November 10, 1917. See Page 108, printed proceedings.)

DECISION RENDERED APRIL 28, 1920

In the matter of the subject referred to in the foregoing title, the following award is concurred in:

Resolved, That this convention notify and instruct the officers of the Asbestos Workers' International Union that the tacking of all muslin and canvas for decorative purposes is the jurisdiction of the Painters and that they instruct their members to refrain from doing any of this work.

Pile Driving Machinery and Engines, Operation of

(Award of Buffalo Convention, Building Trades Department, A. F. of L., adopted November, 1917. See Pages 59 and 105, printed proceedings.)

DECISION RENDERED APRIL 28, 1920

In the matter of the subject referred to in the foregoing title, the following award is concurred in:

Such workmen as are employed in the operation of engines or machinery in connection with a pile driver come under the jurisdiction of the Engineers.

Sheet Metal Glazing for Sash, Frames, Doors, Skylights, etc.

(Subject of dispute between the Brotherhood of Painters, Decorators and Paperhangers and Sheet Metal Workers' International Association.)

DECISION RENDERED APRIL 28, 1920

In the matter of the dispute referred to in the foregoing title, the following agreement is concurred in:

Agreement entered into by and between the General Executive Board of the Brotherhood of Painters, Decorators and Paperhangers of America, and the Sheet Metal Workers' International Association shall take effect December 1, 1910, and remain in force until amended, revised or changed at a meeting between the representatives of both organizations called for this purpose.

SECTION 1. It is agreed by both parties to this agreement that all glass set in sheet metal sash, frames, doors or skylights, shall be set by Painters, according to their claim of jurisdiction granted by the convention of the Building Trades Department, A. F. of L., at St. Louis, December, 1910; and that all sheet metal work on sheet metal sash, frames, doors, or skylights shall be done by Sheet Metal Workers.

SEC. 2. In localities where differences now exist or may arise in the future, such differences shall be

adjusted by a committee appointed by and representing the district councils or local unions of both organizations in that locality. Should this committee be unable to agree, a representative of the General Executive Board of each organization shall be called in to assist in the adjustment.

SEC. 3. It is also agreed that the national officers of both organizations where local unions fail to agree shall insist that this agreement be carried out by affiliated unions.

Slate Treads When Set on Iron Stair Case

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union and the International Association of Bridge and Structural Iron Workers.)

In the matter of the subject referred to in the foregoing title, the following award is concurred in:

DECISION RENDERED APRIL 28, 1920

Slate treads on iron stairs having provoked a dispute in jurisdiction between the organizations above named, was submitted to the Executive Council, November 20, 1909. The action taken follows:

The Executive Council of the Building Trades Department, on being called upon for a decision, awarded the work in question (slate treads) to the Bricklayers.

Unskilled Labor, with Special Reference to the Loading and Unloading of Material as Applied to Re-enforced Concrete Construction

(Subject of dispute between the International Hod Carriers, Building and Common Laborers' Union and International Association of Bridge and Structural Iron Workers.)

DECISION RENDERED AUGUST 2, 1920
AMENDED DECEMBER 11, 1924

It is the decision of the Board that the loading and unloading, carrying and handling of all rods and materials for use in re-enforcing concrete construction shall be done by laborers under the supervision of such persons as the employer may designate The hoisting of rods shall be done by laborers, except when a derrick or outrigger operated by other than hand-power is used. This decision applies only to the character of work stipulated herein. In such localities where existing agreements provide otherwise, this decision is to become effective at the expiration thereof.

Defects in Concrete Caused by Leakage, Bulging, Sagging, etc., Through Defective or Shifting Forms

(Subject of dispute between the Operative Plasterers and Cement Finishers' International Association and the International Hod Carriers, Building and Common Laborers' Union.)

DECISION RENDERED AUGUST 2, 1920

When finishing tools are not used or required, the work shall be done by the laborer.

The filling of voids and other work requiring patching, where finishing tools are used and required, shall be done by the cement finisher.

Setting and Alignment of Tile and Porcelain Bathroom Accessories

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union and the United Association of Plumbers and Steamfitters.)

DECISION RENDERED DECEMBER 4, 1920

In the matter of controversy between the Tile

Layers and Plumbers over setting and Alignment of Tile and Porcelain Bathroom Accessories, it is decided that all bath and toilet room accessories made of clay products, built-in tile-faced walls, shall be the work of the tile setter.

Anchors for Bathroom Accessories

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union and the United Association of Plumbers and Steamfitters.)

DECISION RENDERED NOVEMBER 14, 1923

All bathroom accessories, except those covered by decision rendered December 4, 1920, placed after finished tile wall surfaces are completed, shall be set by Plumbers and Steamfitters. When anchors for bathroom accessories are built into finished tile wall construction, the setting of same shall be done by Bricklayers and Masons and when any such anchors are placed after finished tile wall surfaces are completed, the work shall be done by Plumbers and Steamfitters.

Jurisdiction Over Foremen on Interior Concrete Columns, Foundations for Engine and Machinery Beds

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union, International Hod Carriers, Building and Common Laborers' Union and the Operative Plasterers and Cement Finishers' International Association.)

DECISION RENDERED DECEMBER 4, 1920

In the matter of the jurisdiction over Foremen on Interior Concrete Columns, Foundations for Engine and Machinery Beds as contested by the Bricklayers, Hod Carriers and Plasterers, it is the decision of the Board that the work shall be done by the Laborers under the supervision of such skilled workmen as the employer may designate.

Electrical Work on Elevators (Rehearing)

(Subject of dispute between the International Brotherhood of Electrical Workers and the International Union of Elevator Constructors.)

DECISION RENDERED DECEMBER 4, 1920
REVISED AND AMENDED FEBRUARY 2, 1927

In the matter of dispute between the Elevator Constructors and the Electrical Workers on the question of all electrical work on elevators, it is agreed that the electrical work involved in the installation of signal systems, fans, telephones, electric light fixtures, illuminated thresholds and feed wires to the controller on all elevators is the work of the Electrical Workers; also the electrical work in connection with interlocking devices on other than automatic elevators is awarded to the Electrical Workers.

The term "automatic elevator," as used in this award, includes the full automatic, double push-button single control and department store control elevators.

Bishopric Board, When Applied as a Substitute for Lath and Sheathing

(Subject of dispute between the United Brotherhood of Carpenters and Joiners and the International Union of Wood, Wire and Metal Lathers.)

DECISION RENDERED DECEMBER 4, 1920

In the matter of the dispute over the installation of Bishopric Board when applied as a substitute for lath, it is the decision of the Board that the work shall be done by the Lathers; where the same is used for sheathing it shall be the work of the Carpenters.

Flaxlinum Keyboard Insulation

(Subject of dispute between the United Brotherhood of Carpenters and Joiners and the International Union of Wood, Wire and Metal Lathers.)

DECISION RENDERED DECEMBER 4, 1920

In the matter of the dispute over the installation of Flaxlinum Keyboard and Insulation, it is the decision of the Board that when the same is used as a substitute for lath or when any plastic material is to be applied, the work shall be done by the Lathers; when Flaxlinum is used as insulation or sheathing it shall be the work of the Carpenters.

Installation of Metal Windows

(Subject of dispute between the Sheet Metal Workers' International Association and the International Association of Bridge and Structural Iron Workers.)

DECISION RENDERED MAY 5, 1926

The installation of metal windows having cast-iron sills and cast-iron head blocks or in which three or more of the structural parts—that is, the sills, heads, jambs and mullions—are heavier than ten-guage, shall be the work of the Iron Workers; otherwise it shall be the work of the Sheet Metal Workers.

Hoisting, Lowering and Placing of Elevator Machinery

(Subject of dispute between the Elevator Constructors' International Union and the International Association of Bridge and Structural Iron Workers.)

DECISION RENDERED FEBRUARY 7, 1922

In the matter of the dispute between the Elevator Constructors and Bridge and Structural Iron Workers referred to in the foregoing title, it is decided

that the Elevator Constructors be awarded the hoisting, lowering and placing of elevator machinery.

Glazing as Hereinafter Described

(Agreement for avoidance of dispute between Brotherhood of Painters, Decorators and Paperhangers and Bricklayers, Masons and Plasterers' International Union as endorsed by Building Trades Department, A. F. of L.)

DECISION RENDERED JULY 12, 1922

In the matter of the subject referred to in the foregoing title, it is the decision of the Board that the following agreement be concurred in:

Agreement entered into by and between the General Executive Board of the Brotherhood of Painters, Decorators and Paperhangers of America, and the General Executive Board of the Bricklayers, Masons and Plasterers' International Union shall take effect December 5, 1910 and remain in force until amended, revised or changed at a meeting between the representatives of both organizations called for this purpose.

SECTION 1. It is agreed by both parties to this agreement that all plate and window glass, mirrors, beveled plate, rough, ribbed, wire, figured, colored, or art glass set in sash, frames, doors or skylights constructed of wood, sheet metal, iron, stone, or other material and set with putty or moulding, shall be set by Painters, and that where glass is used as a substitute for ceramic, mosaic, or encaustic tile, and set on floors, walls and ceilings in mortar, cement or other plastic material used to secure such tile in position, shall be set by Bricklayers when cut to size and shape for setting. It is further agreed by the Bricklayers that all glass delivered on jobs in stock sheets shall be cut to the required size by the painters.

SEC. 2. It is agreed by both parties to this agreement that all plate and window glass, mirrors, beveled plate, rough, ribbed, wire, figured, colored, or art glass set in sash, frames, doors or skylights constructed of wood, sheet metal, iron, stone or other material and set with putty or moulding, shall be set by the Painters, and that where glass is used as a substitute for marble in interior finish or decoration, and is carved, cut, polished or rubbed, shall be set by the Bricklayers.

SEC. 3. Should any differences arise regarding the work as covered by this agreement, a committee appointed by and representing the district council or local union of each organization in that locality, shall meet and adjust such differences. Should the committees of the local unions fail to agree, an executive officer of each international union shall be requested to attend and assist in the adjustment.

SEC. 4. It is further agreed that the national officers of both organizations shall insist that all agreements entered into shall be carried out by affiliated unions..

Operation of Elevators for Hoisting Materials

(Decision of St. Louis Convention, Building Trades Department, A. F. of L., adopted December, 1910. See printed proceedings, Page 128.)

DECISION RENDERED JULY 12, 1922

In the matter of the subject referred to in the foregoing title, the following decision is concurred in:

The operation of elevators of all kinds when used for hoisting any material used in the construction of buildings is hereby conceded to the Hoisting En-

gineers affiliated with the International Union of Steam Engineers.

Corrugated Sheeting

(Subject of dispute between International Association of Bridge and Structural Iron Workers and Sheet Metal Workers' International Association.)

DECISION RENDERED MAY 26, 1923

The erection of corrugated metal sheeting on steel frames construction when the sheets are simply end and side lapped is the work of the Iron Workers; the erection of all other corrugated metal sheeting of No. 10 gauge or lighter is the work of the Sheet Metal Workers.

Derricks, Erection and Handling for Setting Stone

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union and International Association of Bridge and Structural Iron Workers.)

DECISION RENDERED MAY 26, 1923

The stonesetter shall have sole jurisdiction over hand derricks in connection with the setting of stone.

The erection and operation of power derricks for setting stone shall be done by the Iron Workers under the direct supervision of the stone setter, who shall determine the number of men to be employed.

Artifical Stone—Granite (Dressing, Altering and Finishing)

(Subject of dispute between Granite Cutters' International Association and Journeymen Stone Cutters Association.)

DECISION RENDERED MAY 26, 1923

In the matter of dispute between the Granite Cutters' International Association and the Journey-

men Stone Cutters' Association relative to artificial stone, the dressing, altering and finishing of artificial stone, cast in imitation of natural stone, is the work of the Stone Cutters, except that when any such artificial stone, by reason of hardness of texture requires the use of granite cutters' tools for the proper dressing, altering or finishing, it is the work of the Granite Cutters.

Flat-face Tile

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union and United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association.)

Decision Rendered May 26, 1923

In the matter of dispute referred to in the foregoing title, the following agreement is concurred in:

Bricklayers, Masons and Plasterers' International Union

vs.

United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association

Agreement entered into this 21st day of February, 1911, amended May 26, 1923, by and between duly accredited representatives of the organizations above named, to-wit:

Jurisdiction is hereby conceded the Bricklayers over the laying or setting of flat-faced tile of every description when laid in mortar on all flat roofs or promenade roofs.

Jurisdiction is hereby conceded the Slate, Tile and Composition Roofers, Damp and Waterproof Workers over flat-faced tile of every description, and corrugated tile, when laid in any preparation of asphalt on roofs, flat or otherwise.

Foremanship Over Concrete Construction

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union, International Hod Carriers' Building and Common Laborers' Union and Operative Plasterers and Cement Finishers' International Association.)

DECISION RENDERED MAY 26, 1923
AMENDED FEBRUARY 21, 1924
REVISED DECEMBER 11, 1924

In the matter of dispute over concrete construction, it is decided the work shall be done by laborers under the supervision of such skilled mechanic as the employer may designate.

Conduo Base, Installation of

(Subject of dispute between International Brotherhood of Electrical Workers and Sheet Metal Workers' International Association.)

DECISION RENDERED AUGUST 2, 1923

In the matter of the controversy between the Electrical Workers and the Sheet Metal Workers as to the installation of conduo base, it is decided that the installation of conduo base is the work of the Sheet Metal Workers.

Setting of Alberene Stone Slabs Used as Drain Boards or Backs in Connection with Sinks

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union and the United Association of Plumbers and Steamfitters.)

DECISION RENDERED NOVEMBER 14, 1923

In the matter of the controversy between the Bricklayers and Masons and the Plumbers and Steam Fitters over the Setting of Alberene Stone Slabs used as Drain Boards or Backs in Connection

with Sinks, it was decided that the setting of Alberene stone slabs used as drain boards or backs in connection with sinks is the work of Plumbers and Steamfitters.

Gunnite Work or Handling of Cement Gun

(Subject of dispute between the International Hod Carriers, Building and Common Laborers' Union, Operative Plasterers and Cement Finishers' International Association and Bricklayers, Masons and Plasterers' International Union.)

DECISION RENDERED FEBRUARY 21, 1924

In the matter of the dispute referred to in the foregoing title, the following decision was reached:

When work to be performed is to be of the thickness of one and one-half inches or greater, the handling of the cement gun shall be done by the Laborers. When the work is less than one and one-half inches in thickness, the handling and control of the nozzle shall be the work of the Plasterers and Cement Finishers.

It is understood that this decision does not allow the Laborers the right to finish where any finishing tools are required.

The application of a coat of cement mixture by means of the cement gun on steel, as a protection against corrosion is not included in this decision.

Plastering Work for Preparation of Walls and Ceilings for Tiling

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union and the Operative Plasterers and Cement Finishers' International Association.)

DECISION RENDERED FEBRUARY 21, 1924

After reviewing the controversy in its various phases, the determination is reached that the agreement previously existing between the two organizations affords the most practical plan of adjustment, and the following award is therefore made as the decision of the Board:

Plasterers shall prepare or plaster all walls and ceilings which are to receive tile, except the final setting bed, which shall be applied by the Tile Layers; the bath rooms, vestibule and small halls in single private residences shall be plastered by the Tile Setters.

Concrete Slab Re-enforced (Pre-Cast) for Roof Tiling

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union and the United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association.)

DECISION RENDERED DECEMBER 11, 1924

Jurisdiction is awarded Slate, Tile and Composition Roofers, over pre-cast re-enforced concrete slabs for roof tiling when pointed up with or laid upon any preparation of asphalt, roofing cements or other mastics, on roofs, flat or otherwise.

When laid in cement, lime or gypsum mortars, the work is awarded to Bricklayers.

Installation of Air Piping in Connection with Elevator Door Locks

(Subject of dispute between the United Association of Plumbers and Steamfitters and the International Union of Elevator Constructors.)

DECISION RENDERED NOVEMBER 11, 1925

When the compressor is used only for elevator work, the work from the water main to the com-

pressor and return shall be the work of the plumbers and steamfitters. The elevator constructor shall set the compressor and do all the work between the compressor and the locking device, but when the compressor is used for other purposes than elevator work, then the compressor shall be set by the plumbers and steamfitters, and the elevator constructor shall do the necessary piping from the compressor to his work only, all other work to be done by the plumbers and steamfitters.

Setting, Installing or Sticking of Artificial Stone

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union and Operative Plasterers and Cement Finishers' International Association.)

DECISION RENDERED MAY 5, 1926

It is decided that the setting, installing or sticking of artificial stone, the material base of which is gypsum, plaster of Paris or Keene cement, resembling plaster in character and density, wherever used on the interior of building, whether or not reinforced with burlap or other fibrous material, regardless of color, or whether or not faced with any special cement, whether pre-cast or run in place, is the work of the Plasterers.

Wherever artificial stone, the material base of which is of other cements, which comes pre-cast and resembles the natural stone in character and density, regardless of color, whether or not faced with any special cement, the work is that of the Bricklayers.

Cutting of Chases and Channels in Brick, Tile and other Masonry

(Matter referred to National Board for Jurisdictional Awards by Executive Council, Building Trades Department.)

DECISION RENDERED MAY 5, 1926

Inasmuch as no other trades except the Bricklayers, Plumbers and Steamfitters and Electricians have claimed this work, it is decided that the cutting of chases and channels in brick, tile and other masonry is the work of the Bricklayers, except that the Plumbers and Steamfitters and Electricians shall have jurisdiction to do cutting where required for the installation of their respective work.

Placing of Trap Rock Floors by Terrazzo Methods

(Subject of dispute between the Bricklayers, Masons and Plasterers' International Union and Operative Plasterers and Cement Finishers' International Association.)

DECISION RENDERED MAY 5, 1926

The finishing of cement floors where additional aggregate of stone is added by spreading or sprinkling on top of the finished base and troweled or rolled into the finish and then the surface ground by grinding machines, shall be under the jurisdiction of the Terrazzo Workers. When no additional stone or aggregate is added to the finished mixture, even though the surface may be ground, the work shall be under the jurisdiction of the Cement Finishers.

Jurisdiction Over Operation of Electric and Traveling Cranes During Construction of Building

(Subject of dispute between the International Union of Steam and Operating Engineers and International Brotherhood of Electrical Workers.)

(Decision Executive Council, American Federation of Labor, March, 1926.)

ADOPTED AUGUST 4, 1926

"The Executive Council has been asked for an interpretation of decision rendered by the 1922 Cin-

cinnati Convention of the American Federation of Labor, as it relates to the jurisdiction of overhead or traveling cranes installed as a permanent fixture in building while building is under construction and cranes are being used to handle building material for the construction of building and also for the setting of motors, generators and other electrical equipment.

"The decision provides that the Engineers have jurisdiction over the hoists for building material on building under construction, and that the Electrical Workers have jurisdiction over the overhead or traveling cranes for shop or factory purposes. Therefore if the overhead or traveling cranes are used exclusively to handle building material for the building, cranes shall be operated during such construction by members of the Steam and Operating Engineers.

"If motors and other electrical equipment are being set in place while building is under construction and a crane or cranes are used for such setting, the Engineers shall operate the crane, handling both building material and electrical equipment until 50 per cent of the motors or electrical equipment are set, and then the Engineers shall cease to operate crane and shall turn same over to be operated by Electricians, who will operate the crane for all purposes thereafter.

"In the event of two overhead cranes being used to handle building material and electrical equipment, then one crane shall be operated by Engineer and one be operated by Electrician for all the work required of that crane, in which case each operator shall be employed until the plant is completed, when Engineer shall turn crane over to Electricians to operate."

DECISIONS RENDERED AND HELD TO BE OPERATIVE BY THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT.

Jurisdiction Over Spot Grounds

DECISION BALTIMORE CONVENTION, 1916

All ground work, continuous or of spot character, for the purpose of receiving trim, shall be done by the Carpenter; all spot ground work, when applied solely for the guidance of plastering work, shall be done by the Plasterer.

Plaster Boards or Substitute Materials Therefor

JULY 25, 1919

The erection or construction of plaster board ceilings or partitions which are to receive plaster is the work of the Lather. This form of construction is fundamentally and primarily a lathing feature, as is wire lath attached to light iron furring. The studs or runners used in this form of construction are in principle similar to light iron furring as conceded to the Lather.

Setting of Screeds in Cement Construction and Form Work

MARCH 17, 1920

The decision is that setting screeds in connection with the finishing of cement floors is conceded as Cement Finishers work.

Setting Electrical Motors

AUGUST 14, 1920

Handling, setting and adjusting of motors and connecting of power thereto is work of Electrical Workers. Fastening of motors direct to motor-driven machinery is work of Millwrights.

Boilers, Moving, Handling and Placing

OCTOBER 3, 1923

Work in question being vital part of Steam Fitters equipment is therefore the work of the Steam Fitter.

Holorib Deck Roofing

JANUARY 26, 1928

Have received the sample of Holorib deck roofing. This material being less than ten gauge, therefore, under the rulings of this Department; the Sheet Metal Workers have jurisdiction.

Steeltex Re-enforcement

AUGUST 9, 1929

Welded wire mesh steeltex used primarily for re-enforcing is the work of the iron workers. Paper back steeltex which performs the same function and is used for the same purpose as hy-rib is the work of the Lather.

Bush Hammering of Concrete Base Foundation

SEPTEMBER 23, 1930

The bush hammering of concrete comes within the jurisdiction of the Cement Finishers.

Teamster-Engineer Decision

OCTOBER 27, 1939

(Decision rendered by subcommittee of the Executive Council of the Building and Construction Trades Department, A. F. of L., and approved by the 34th Annual Convention of the Department, New Orleans, La., November, 1940.)

For a complete report of subcommittee see pages 138 to 143, inclusive, of the Proceedings of the 34th Annual Convention.

DECISION

All power-driven equipment that is used exclusively as a vehicle to transport any material or other matter for building or other construction work comes within the jurisdiction of the Teamsters and Chauffeurs.

All power-driven equipment used on any and all types of building and other construction work, including any and all power-driven equipment that has been in dispute between the Teamsters and Engineers, comes within the jurisdiction of the International Union of Operating Engineers.

WM L. HUTCHESON, *Chairman.*
R. J. GRAY, *Secretary.*
D. W. TRACY.

January 29, 1940.

The Executive Council,
Building and Construction Trades Department,
American Federation of Labor.

Your committee appointed to handle the matter of the dispute between the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers and the International Union of Operating

Engineers received a request from President Tobin of the Teamsters for a clarification of the decision.

President Hutcheson, President Tracy and Mr. Gray met with Messrs. Tobin, Gillespie and Farrell on Sunday evening, January 28, and the Teamsters requested information on the following:

1. On agreements on the Pacific coast, west of the Rocky Mountains, which he claimed it would be impossible for him to immediately abrogate without considerable difficulty.

2. The matter of operation of what is known as trac-trucks which are used exclusively for the transportation of materials.

3. The questions of the members of Teamster Unions who had been employed as Chauffeurs on what is known as a crane mounted on a truck chassis which is used exclusively in the New York metropolitan area.

The conference adjourned after it was agreed that your committee would confer with the representatives of the Engineers on Monday, January 29.

At the conference with the Engineers the following were present: John Possehl, Brothers, Fay, Maloney and Stuhr. President Possehl agreed that he would not call for immediate operation of the decision that would affect any existing agreements on the Pacific coast, west of the Rocky Mountains. However, he expressly stated that this would not apply to any agreements that may have been made after the decision of the committee had been rendered.

On question number two—on the operation of trac-trucks used exclusively to transport materials

—the Engineers agreed that the operation of such trucks is the work of the Teamster.

The operation of trucks, which have a crane mounted on the truck chassis was next discussed. The Engineers agreed that they would accept any Teamster members who had been employed for any length of time in the driving of these trucks to membership in their organization. Brothers Possehl, Fay and Delaney agreed to sit down with representatives of the Teamsters as far as the metropolitan area of New York was concerned and adjust the matter in a peaceful manner locally.

WM. L. HUTCHESON,
D. W. TRACY,
R. J. GRAY.

DECISIONS RENDERED BY DR. JOHN A. LAPP, NATIONAL REFEREE FOR THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, A. F. OF L.

Setting Wall Bearing Steel Bar Joists

DECISION RENDERED APRIL 23, 1937

"The work of setting wall bearing steel bar joists comes under the jurisdiction of the International Association of Bridge Structural and Ornamental Iron Workers."

Erection of Economizers

DECISION RENDERED SEPTEMBER 20, 1937

"The decision of the Joint Conference Board of Chicago is affirmed and the decision of the Executive Council of the American Federation of Labor is held to be in force. That decision reads as follows:

"In the controversy existing between the Brotherhood of Boiler Makers and the United Association of Plumbers and Steam Fitters over the erection of economizers, the decision is that in the opinion of the Executive Council the work belongs to the United Association of Plumbers and Steam Fitters."

Jurisdiction Over Lock Gates and Flood Gates

DECISION RENDERED OCTOBER 21, 1937

"The decision of President Williams is affirmed. The subject-matter of lock gates and flood gates is not covered by the agreement between the Boiler Makers and Iron Workers and the dispute in ques-

tion is subject to arbitration section of the agreement as follows:

"Section 7. Any further disputes that may arise between the parties of this agreement shall be first considered by the respective General Presidents. Upon their failure to agree, the question shall be submitted to arbitration. None of the work definitely decided upon in this agreement shall be subject to further arbitration."

Jurisdiction Over Operation of Electric Generators for Welding Purposes

DECISION RENDERED OCTOBER 25, 1937

The Decision of the Referee is that the binding national decisions of the American Federation of Labor, the Building and Construction Trades Department of the American Federation of Labor and the National Board of Jurisdictional Awards cover the operation of electrical welding apparatus and that such operation is incident to the trade doing the welding. The decision of the Newark Committee on Jurisdictional Disputes is overruled and the jurisdictional right to operate electric welding sets is held to be, by existing decisions, within the jurisdiction of the trade doing the welding.

Pointing and Caulking of Steel Window Frames When Incased in Brick Walls

DECISION RENDERED NOVEMBER 18, 1937

The decision of the St. Joseph, Mo., Joint Arbitration Board awarding jurisdiction over the pointing and caulking of steel window frames, when encased in brick walls, to the International Association of Bridge and Structural Iron Workers is reversed and such work, when done with mortar

or plastic materials of any kind is held to be within the jurisdiction of the Bricklayers, Masons and Plasterers' International Union of America.

Decision of the Referee on the Interpretation of the Agreements Between the Bricklayers, Masons and Plasterers' International Union of America and the Operative Plasterers and Cement Finishers' International Union of America Relating to Artificial Stone and Marble and Acoustical Tile.

DECEMBER 20, 1937

The Referee decides that the installation of the material in question on the Library of Congress Annex comes under the 1929 agreement and is, therefore, under the terms of the agreement, within the jurisdiction of the Bricklayers, Masons and Plasterers' International Union of America. The material is in no real sense, except in its acoustical properties, similar to the acoustical tile which was the subject of the 1930 agreement. There may be border line cases between the two types of material covered in the agreements of 1929 and 1930 but this material is not one of them. It is clearly on the side of artificial stone, rather than on the side of materials similar to acoustical tile or, particularly, the U. S. Gypsum product known as Acoustone. Moreover, its installation follows the craft method used by the Bricklayers, Masons and Plasterers' International Union.

This decision applies only to the interpretation of the agreement between the Bricklayers and Operative Plasterers' Unions.

(Signed) JOHN A. LAPP, *Referee*

Jurisdiction Over the Unloading of Ready Mixed Concrete from Certain Types of Trucks to the Ground on Building and Construction Jobs.

DECISION RENDERED JANUARY 17, 1938

The Referee decides that the unloading of ready mixed concrete from trucks to a building or construction job, by means of machinery, attached to the truck, that removes the concrete from the bin of the truck, and the operation of the motor or piece of machinery used in unloading, is the work of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America.

Decision of the Referee on the Question of Drying and Handling Sludge at the Southwest Sewage Treatment Works in Chicago.

MAY 2, 1938

THE DECISION

The erection of the process, piping, ducts and equipment for the drying and handling of sludge at the Southwest Sewage Treatment Works at Chicago is within the jurisdiction of the International Brotherhood of Boiler Makers and Iron Ship Builders and Helpers of America.

Memorandum to the Decision on the Drying and Handling of Sludge at the Southwest Sewage Treatment Works in Chicago.

MAY 25, 1938

This decision is limited to the fabricated steel ducts, through which sludge passes in the drying process, as explained in the opinion accompany-

ing the decision. It does not apply to the piping of coal, which was specifically withdrawn from the complaint, nor does it apply to the equipment between the furnace and the pre-heater or between the pre-heater and the roof. It does not apply to any other portion of the equipment which is regularly in the jurisdiction of any other International Building and Construction Trades Union.

(Signed) JOHN A. LAPP, *Referee.*
Building and Construction Trades Dept.,
American Federation of Labor.

Decision in the Matter of Setting of Vitrolite and Similar Forms of Structural Glass

JUNE 14, 1938

THE DECISION

The Referee finds and decides that the setting of vitrolite and similar structural glass on inside work belongs within the jurisdiction of the Bricklayers, Masons and Plasterers' International Union of America, except when such structural glass is set in panels, sash, frames or mouldings or with toggle bolts, screws, rosettes or similar fastenings, or secured in some other manner common to the work of the Glaziers. The Referee finds and decides that vitrolite and similar structural glass, when set on outside walls of buildings or structures, in mortar, cement or plastic material or when anchored to the wall in the manner common to the trade of the Marble Setter, belongs within the jurisdiction of the Bricklayers, Masons and Plasterers' International Union of America.

The Referee finds and decides that all outside work around windows and entrances in store and

office fronts opening on streets, arcades, corridors or other public places, including columns at such entrances, belongs to the Brotherhood of Painters, Decorators and Paperhangers of America. The above shall include substantial borders not exceeding three feet around such windows and entrances. Other outside installation of structural glass on exterior walls belongs to the Brotherhood of Painters, Decorators and Paperhangers of America, if set on one or more sides in panels, frames or mouldings or with metal or other strips used to support it or if secured with toggle bolts, screws or similar fastenings, despite the additional use of any form of plastic or mastic composition.

The installation of structural glass, when used as background for store and office signs and advertising, is within the jurisdiction of the Brotherhood of Painters, Decorators and Paperhangers of America.

When glass is used of a thickness of more than one-half inch, its installation belongs within the jurisdiction of the Bricklayers, Masons and Plasterers' International Union of America, unless it is set in sash frames, doors or skylights in a manner similar to that used by Glaziers.

Wherever at this time any local agreement exists which is affected in any way by this decision, the effective date of this decision shall be in such cases three months from this date, or September 14, 1938, otherwise the decision is effective as of this date.

The Referee is aware of the fact that there are many variations in the installation of structural glass and that some specific cases may not be covered by this decision. He believes that the Inter-

national Officers of the two Unions involved can readily find a solution for any specific application on the basis of the broad principles laid down in this decision and he suggests that on the basis of this decision, provision be made that any dispute over its application be referred for interpretation to the Referee or some other impartial agency.

Jurisdiction Over the Assembling and Erection of Certain Meal Bins, Grit Bins and Grain Bins in the Eichler Brewery, New York City.

OCTOBER 31, 1938

THE DECISION

The decision of the Building Trades Employers' Association of the City of New York, granting jurisdiction over the erection of grain storage bins in the Eichler Brewery to the International Association of Bridge, Structural and Ornamental Iron Workers is overruled and the dispute is declared to be one which must be submitted to arbitration according to the provisions of Section 7 of the agreement between the International Brotherhood of Boiler Makers, Iron Ship Builders and Helpers and the International Association of Bridge, Structural and Ornamental Iron Workers.

(Signed) JOHN A. LAPP, *Referee.*

DECISION RENDERED BY PETER ELLER, NATIONAL REFEREE IN DISPUTE OVER ASPHALT AND RUBBER TILE, ROLL AND SHEET LINOLEUM.

July 6, 1942.

United Brotherhood of Carpenters and Joiners of America.

Brotherhood of Painters, Decorators and Paper Hangers.

United Slate, Tile, and Composition Roofers, Damp and Waterproof Workers' Association.

Bricklayers, Masons and Plasterers' International Union.

Operative Plasterers and Cement Finishers' International Union.

In addition, briefs setting forth the claims of the respective organizations were also sent to the Referee.

After due and careful consideration, it is the decision of the Referee that the jurisdiction of the work in question be divided between the United Brotherhood of Carpenters and Joiners, and the Brotherhood of Painters on the following basis:

To the Brotherhood of Painters, Kansas City, Missouri and all territory to the Westward.

To the United Brotherhood of Carpenters and Joiners, all territory East of Kansas City.

In connection with the decision above stated, the following recommendations are made:

1. That members of the Tile Setters affiliated with the B. M. P. I. U., and the Cement Finishers affiliated with the O. P. C. F. I. A. capable of doing this work be taken into either or both the organizations above mentioned without payment of initiation fee and without losing their membership in their own organizations, somewhat on the basis of the agreement now existing between O. P. C. F. I. A. and B. M. P. I. U. relative to the exchange of cards in connection with plastering.
2. On account of the prolonged controversy over

the work in question, it is suggested that this decision be not made effective for three (3) months so as to permit of any necessary adjustments on existing contracts.

3. This decision deals solely with the material mentioned above when used on floors and characterized as "resilient floors" or "resilient floor coverings." It does not cover roofing nor the application of these materials to walls.

P. W. ELLER,
National Referee.

DECISIONS RENDERED BY NATIONAL REFEREE WILLIAM L. HUTCHESON.

Decision by the National Referee of the Building and Construction Trades Department, William L. Hutcheson, in the jurisdictional dispute between International Hod Carriers, Building and Common Laborers Union of America and United Association of Journeymen Plumbers and Steamfitters of the United States and Canada in the matter of installation of non-metallic piping for sewers.

The following is a resume, conclusions and findings by the National Referee for the Building and Construction Trades Department, in the case of the jurisdictional dispute between the International Hod Carriers, Building and Common Laborers' Union of America and the United Association of Journeymen Plumbers and Steamfitters of the United States and Canada, in the matter of: installation of non-metallic pipe for sewers.

The hearing was called to order, by the Referee, on Monday, October 8, 1945, at 10 a. m., in the Netherland Plaza Hotel, Cincinnati, Ohio.

Present at the hearing were representatives of the Hod Carriers and Common Laborers' Union; Plumbers and Steamfitters; Bricklayers International Union and the Brotherhood of Teamsters.

Representatives of the Hod Carriers and Common Laborers' submitted preliminary objections to the Referee having jurisdiction in the dispute.

Their objections were primarily based on the contention that there was in existence an agreement between the Hod Carriers, Building and Common Laborers' Union and the United Asso-

ciation of Journeymen Plumbers and Steamfitters, and in substantiation of their contention they submitted an agreement as of the date, January 23, 1941, between the two organizations.

In their remarks in reference to their preliminary objections the statement was made by representatives of the Hod Carriers and Common Laborers' that they were ready to meet any of the trades that have any claim to work covered in the agreement.

Representatives of the United Association of Plumbers and Steamfitters replied to the objection raised by representatives of the Hod Carriers and Common Laborers' but stated that they recognized the agreement as of January 23, 1941.

After hearing both parties present their views in reference to the agreement, and listening to considerable discussion, the Referee stated that he was placed in the position of having to make a ruling on the agreement as of January 23, 1941, and ruled that said agreement was a bona fide agreement, without any interpretation of the meaning thereof, and should stand as an agreement between the two organizations; with the understanding that there should be no infringement upon the jurisdiction of other organizations.

After the above ruling was made the two contesting parties were asked to arrange to meet and see if some mutual understanding could be arrived at, after which the hearing was adjourned at 11:30 a. m. (October 8) until the next morning at 10 a. m.

The hearing was reconvened on Tuesday, October 9, at 10 a.m.

A report was asked for by the Referee as to what, if any, progress was made in reference to

reaching an understanding, and it was stated that no understanding was reached.

The Referee then stated that while it was permissible for the two organizations to enter into an agreement, such as was reached January 23, 1941, inasmuch as no understanding was reached yesterday afternoon in the conference that was held by representatives of the two organizations, he would rule that the case which was referred to him by the Acting President of the Building and Construction Trades Department in May, 1944, would be heard as per that arrangement.

A representative of the Hod Carriers then asked if the dispute before the Referee was covered by the agreement.

The Referee, in reply to that question, stated that until he heard the evidence he would not be able to determine whether it came under the agreement, or whether it did not, and that he would reach that conclusion after he had heard the evidence.

A representative of the Hod Carriers and Common Laborers' then stated, if a hearing was going to be held on the merits of the case they were in the unfortunate position of being unable to participate, for the reasons: that the agreement itself is self-explanatory to some degree, and in order to clarify it more, the respective International Presidents of the disputant parties appointed committees for the purpose of clarification, and when they reached an interpretation they sent a letter to the respective International Presidents, which letter they stated they wished to read.

Objections were raised by representatives of the Plumbers which brought forth a discussion as

between they and representatives of the Hod Carriers and Common Laborers' after which the Referee stated that he would allow the letter to be read and then determine whether it would go into the record, or whether it would not.

After the letter was read the Referee asked what the purpose for reading it was, and was answered by a representative of the Hod Carriers and Common Laborers' that the purpose in reading the communication was to show that the interpretation arrived at by the committee was in good faith.

The Referee then ruled that in the original agreement no reference was made in regards to appointing a committee to interpret the meaning thereof, and further ruled that the letter would not appear in the record.

After some discussion and statements by representatives of the two organizations, during which reference was made to a decision rendered by Acting President of the Building and Construction Trades Department, representatives of the Hod Carriers and Common Laborers' asked to be excused on the grounds that participation by them in the hearing on the merits of the case would constitute a waiver of their rights, with leave to appeal the matter further.

In the discussion they were asked if they wished to appeal. They stated: With leave to appeal the matter further. They were informed that it was up to them to follow the laws of the Department and the Federation inasmuch as the Referee had no authority to say whether they had a right to appeal or whether they did not.

Representatives of the Hod Carriers and Common Laborers' further contended if they anticipated

that they would waive their rights as the work in contention was covered by the agreement which had been recognized, and inasmuch as they had other tribunals to go to they interjected the last request that they be given leave to appeal.

A discussion (off the record) was had at this point, when it was again asked by one of the representatives of the Hod Carriers that his point be made a part of the record. Asked to repeat his statement, he stated, they were unable to participate in the case on its merits. He was asked if he wanted to use the word "unable" or "unwilling." He replied, we are placed in the position of being unable to participate in the hearing by reason of the fact that it would constitute a waiver of our rights, in the absence of a ruling by the Referee as to whether the dispute was covered by the agreement.

They were informed by the Referee that it would be a part of the record as to why they were not going to participate.

The Plumbers then proceeded to present evidence to substantiate their claim for work, as per the decision of Acting President Gray.

They presented extensive briefs and evidence to substantiate their claim, consisting of numerous exhibits and illustrations of installations of the work in contention.

After they completed presentations of their evidence the matter was reported to the Executive Council of the Building and Construction Trades Department for consideration, and action, for the benefit and information of the Referee as to what the desires of the Council were in reference to making a finding and decision, because of the Hod Carriers and Common Laborers' withdrawing from

the hearing; after which the Executive Council took the following action:

"Action of Council: Referee should proceed and render decision in accordance with Section 7, Page 26 of Constitution of Department.

"Vote: Unanimous. V. P. Hutcheson not voting."

Pursuant to the foregoing action of the Executive Council, and after reviewing the evidence, I have reached the following conclusion:

That the agreement as referred to between the International Hod Carriers, Building and Common Laborers' Union of America and the United Association of Journeymen Plumbers and Steamfitters of the United States and Canada, covers work on subways, tunnels, highways, viaducts, streets and roadways in connection with sewers and water mains, and therefore, does not apply to the question at issue, which is, the decision rendered by the Acting President of the Building and Construction Trades Department, Richard J. Gray, which was rendered under date of March 13, 1944, in the dispute between Laborers and Plumbers over the laying of sewer pipe from main sewer into dwelling, or from inside property line to dwelling, and is not in any way referred to by the agreement of January 23, 1941, entered into between the two organizations.

Records show that the request for a decision came to the Acting President in the regular manner, and that he rendered his finding on the date of March 13, 1944, and in referring to the matter stated it was a jurisdictional dispute between Laborers' and members of the Journeymen Plumbers and Steamfitters over the laying of lateral sewer pipe from main sewer into dwelling or from

inside property line to dwelling, and the following decision was rendered:

"DECISION"

The work in dispute shall be done by members of the United Association of Journeymen Plumbers and Steam Fitters.

In the opinion of the undersigned, acting as Referee, the decision rendered by Acting President Gray, was in conformity with the evidence submitted to me as Referee, and in no way comes under the agreement entered into between the two contending organizations as of January 23, 1941.

Therefore my decision is as follows:

October 13, 1945.

1. That the agreement, dated January 23, 1941, between the International Hod Carriers, Building and Common Laborers' Union of America and the United Association of Journeymen Plumbers and Steamfitters of the United States and Canada is a bona fide agreement between the two organizations, but should not be accepted by the Department until clarifying language is inserted therein giving to the Bricklayers' International organization jurisdiction over work on sewers which they have heretofore performed.

Also that there should be a clarification in reference to the unloading and distributing of pipe so that there would be no infringement upon the recognized jurisdiction of the Teamsters International organization.

There should also be a further clarification if any other organization presents evidence to show that the agreement infringes upon their jurisdiction.

2. That the laying of lateral sewer pipe from main sewer into dwelling, or from inside property

line to dwelling is work that should be done by, or under the supervision of, members of the United Association of Journeymen Plumbers and Steamfitters of the United States and Canada.

WM. L. HUTCHESON (Signed)

National Referee,
Building and Construction Trades Department

(NOTE—This in no way deletes or expunges from the records of this Department the letter of March 9, 1946, addressed to the Morris County, New Jersey, Building and Construction Trades Council or the advice contained in Vice President Hutcheson's telegram of March 27, 1946.)

Pointing, Taping and Filling of Joints on Wall Board

May 19, 1947.

Mr. Richard J. Gray, President
Building and Construction Trades Department
501 A. F. of L. Building,
Washington 1, D. C.

Dear Sir and Brother:

In the matter of the jurisdictional controversy over the pointing, taping and filling of joints on wallboard in preparing it to receive paint and other wall coverings, involving the Brotherhood of Painters, Decorators and Paperhangers of America; Bricklayers, Masons and Plasterers International Union of America and the Operative Plasterers and Cement Finishers International Association of the United States and Canada, a hearing was held in the Executive Council room, American Federation of Labor building, May 6, 1947.

Representing the organizations involved were: Harry C. Bates, President of the B. M. and P. I. U. of A.; John E. Rooney, President of the

O. P. and C. F. I. A.; L. P. Lindelof, General President, B. of P. D. and P. of A.; Joseph P. Hillock, Painters, Washington, D. C.; J. C. Moenick, Secretary-Treasurer, Painters District Council, Chicago, Ill.; Milton R. Stephens, Plasterers, Washington, D. C., and Walter Redmond, International Secretary of the O. P. and C. F. I. A.

After giving the statements made, and evidence submitted, careful consideration I have reached a conclusion and render the following decision; to wit:

When plaster material is used to do pointing and filling it shall be the work of members of the Operative Plasterers and Cement Finishers International Association of the United States and Canada—and/or—members of the Bricklayers, Masons and Plasterers International Union of America.

When adhesive materials are used it shall be the work of members of the Brotherhood of Painters, Decorators and Paperhangers of America.

Respectfully submitted,

WM. L. HUTCHESON (Signed)

Referee,

Building and Construction Trades Department.

Sitting with Referee at hearing were: Vice Presidents Wm. J. McSorley and Robert Byron of the Building and Construction Trades Department.

Erection of Catwalks and Stairways

May 19, 1947.

Mr. Richard J. Gray, President
Building and Construction Trades Department
501 A. F. L. Building,
Washington 1, D. C.

Dear Sir and Brother:

In the matter of the jurisdictional controversy over the erection of catwalks and stairways involving the International Association of Bridge, Structural and Ornamental Iron Workers and the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, a hearing was held in the Executive Council room, American Federation of Labor building, May 8, 1947.

Representing the organizations involved were: P. J. Morrin, General President; J. H. Lyons, General Secretary; J. J. Dempsey, General Treasurer, International Association of Bridge, Structural and Ornamental Iron Workers; also Clyde F. Strickland, Vice President and Leslie L. Myers, Washington, for the Iron Workers and J. V. Kearney, International Vice President and T. L. Wants, Special Representative, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America.

Representatives of the two Internationals appeared before the undersigned, as Referee, and submitted briefs and evidence to substantiate their claims, and among other things presented an agreement entered into between the two organizations in 1928. Their attention was called to the provisions of Sections 37 and 38 of the Constitution of the Building and Construction Trades Department which set forth:

"Nothing in Sections 37 and 38 is to be construed as giving any organization the right to reopen any case listed by the Building and Construction Trades Department and published in the records of the Department."

After their briefs were presented a full discussion was held in reference to the matter and it is the opinion and conclusion of the undersigned that the decision rendered by the President of the Department under date of January 27, 1947, would seem to be as clear a clarification of their agreement in reference to the erection of catwalks and stairways as could be arrived at under the wording of the agreement, and I herewith quote the decision of the President of the Building and Construction Trades Department as of January 27, 1947.

"Where catwalks, ladders and stairways are erected in connection with bubble towers and tanks and are attached to the structural steel supports this work shall be the work of the members of the International Association of Bridge, Structural and Ornamental Iron Workers.

"Where such catwalks, ladders and stairways are riveted or welded to the watertight sections of the bubble towers or tanks this work shall be done by the members of the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers."

Respectfully submitted

WM. L. HUTCHESON (Signed)

Referee,

Building and Construction Trades Department.

Sitting with Referee at the hearing were: Vice Presidents Wm. J. McSorley and Martin P. Durkin of the Building and Construction Trades Department.

Q-Panels

May 19, 1947.

Mr. Richard J. Gray, President
Building and Construction Trades Department
501 A. F. of L. Building,
Washington 1, D. C.

Dear Sir and Brother:

In the matter of the jurisdictional controversy over the erection of aluminum Q-panels involving the Sheet Metal Workers International Association and the International Association of Bridge, Structural and Ornamental Iron Workers, a hearing was held in the Executive Council room, American Federation of Labor building, May 7, 1947.

Representing the organizations involved were P. J. Morrin, General President; J. H. Lyons, General Secretary and J. J. Dempsey, General Treasurer, International Association of Bridge, Structural and Ornamental Iron Workers; Glenn Hurley, Superintendent, H. H. Robertson Company; George Bigelow, Manager of Erection, H. H. Robertson Company, and George L. Illig, Contract Department, H. H. Robertson Company, and Robert Byron, General President, Sheet Metal Workers International Association and Joseph Fredericks, Sheet Metal Workers International Association.

At the hearing held, briefs were submitted and statements made by the contesting parties, as well as a display of the material in question.

In the statements made by representatives of the two Internationals, considerable emphasis was made in reference to decisions rendered some years ago giving to the Sheet Metal Workers jurisdiction over the installation of metal of ten gauge or

lighter, but the question before the Referee in this case was the installation of Q-panels.

After giving the evidence as submitted due consideration I am of the opinion that:

The erection of Q-panels, which was the point at issue, when fastened to the steel structure of a building, should be the work of members of the International Association of Bridge, Structural and Ornamental Iron Workers.

However, any flashing or ventilator work in connection therewith should be the work of the members of the Sheet Metal Workers International Association.

Respectfully submitted,
WM. L. HUTCHESON (Signed)
Referee,
Building and Construction Trades Department.

Sitting with Referee at the hearing were: Vice Presidents Wm. J. McSorley and Martin P. Durkin of the Building and Construction Trades Department.

Robertson Protected Metal

May 19, 1947

Mr. Richard J. Gray, President
Building and Construction Trades Department
501 A. F. of L. Building,
Washington 1, D. C.

Dear Sir and Brother:

In the matter of the jurisdictional controversy over the erection of Robertson Protected Metal involving the Sheet Metal Workers International Association and the International Association of Bridge, Structural and Ornamental Iron Workers, a hearing was held in the Executive Council room,

American Federation of Labor building, May 7, 1947.

Representing the organizations involved were P. J. Morrin, General President; J. H. Lyons, General Secretary and J. J. Dempsey, General Treasurer, International Association of Bridge, Structural and Ornamental Iron Workers; George Bigelow, Manager of Erection, H. H. Robertson Company, and Robert Byron, General President, Sheet Metal Workers International Association, and Joseph Fredericks, Sheet Metal Workers International Association.

When this case came on for hearing on the question of erection of Robertson Protected Metal, in presenting their briefs and evidence, the two contestants both referred to a ruling or decision rendered under date of May 26, 1923, by the former Board of Jurisdictional Awards, and while it was admitted by representatives of both International organizations that the ruling made as above referred to; namely May 26, 1923, has been recognized and published in the records of the Building and Construction Trades Department, attention was also called to Paragraph 5, Section 38 of the Constitution of the Building and Construction Trades Department which sets forth:

"Nothing in Sections 37 and 38 is to be construed as giving any organization the right to reopen any case listed by the Building and Construction Trades Department and published in the records of the Department."

Under that provision I can only reach the conclusion that as Referee I would have no right to render a definite decision in the case at issue.

If the two contesting International organizations desire a clarification of the action taken by the

former Board of Jurisdictional Awards under date of May 26, 1923, they could by joint request ask for such interpretation or clarification.

Respectfully submitted

WM. L. HUTCHESON (Signed)

Referee,

Building and Construction Trades Department.

Sitting with Referee at the hearing were: Vice Presidents Wm. J. McSorley and Martin P. Durkin of the Building and Construction Trades Department.

DECISIONS OF NATIONAL JOINT BOARD FOR SETTLEMENT OF JURISDICTIONAL DISPUTES, BUILDING AND CONSTRUCTION INDUSTRY & HEARINGS PANELS.

DECISION OF JOINT BOARD NO. 3

Beer Lines, Wort Lines, Yeast Lines, CO_2 Lines, and Refrigeration in Connection With Attemperator Tanks

AUGUST 20, 1948

Dispute between the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the Sheet Metal Workers' International Association.

The issue in dispute is the installation of copper piping in breweries for beer lines, wort lines, yeast lines, CO_2 lines, and refrigeration in connection with attemperator tanks.

After carefully considering all of the evidence and argument as presented by both sides, the Joint Board decides as follows:

The installation of streamlined or other manufactured copper pipe or fittings for beer lines, wort lines, yeast lines, CO_2 lines is the work of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fittings Industry of the United States and Canada. The installation of copper attemperator coils in the interior of tanks and vats in breweries is the work of the Coppersmiths, members of the Sheet Metal Workers' International Association.

The decision of the Joint Board is unanimous.

WM. J. MCSORLEY,
HARRY C. BATES,
ARTHUR H. WELLS,
A. HERRMANN WILSON,
JOHN T. DUNLOP,
Chairman.

DECISION OF JOINT BOARD NO. 15

Steel Decking, Roofing, Flooring, Raceway for Electrical Wiring

AUGUST 21, 1948

Dispute between the Sheet Metal Workers International Association and the International Association of Bridge, Structural and Ornamental Iron Workers.

The issue in dispute is that involved in cases 15 and 22. The Joint Board may consider the whole issue of the installation of steel decking in accordance with the agreement between the two unions.

After carefully considering all of the evidence and argument as presented by both sides, and two intervening organizations, the Joint Board decides as follows:

The installation of steel decking for roofing, if 10 gauge or lighter, is the work of the Sheet Metal Workers International Association. The installation of steel decking for flooring is the work of the International Association of Bridge, Structural and Ornamental Iron Workers. This decision cannot alter previous decisions of record, such as January 26, 1928 (Holorib), May 19, 1947 (Q-Panel), June 3, 1948 (Metro-Deck). Whenever steel decking for flooring or roofing is used as a raceway for electri-

cal wiring the electrical work in connection with the raceway is that of the International Brotherhood of Electrical Workers.

The decision of the Joint Board is unanimous.

WM. E. MALONEY,
L. P. LINDELOF,
ARTHUR H. WELLS,
ALBERT BEEVER,
JOHN T. DUNLOP,
Chairman.

JOINT BOARD NO. 2

Pre-Heating and Stress Relieving of Welds

SEPTEMBER 22, 1948

Dispute between the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the International Brotherhood of Electrical Workers.

The issue in dispute is the pre-heating and stress relieving of welds.

After carefully considering all of the evidence and argument as presented by both sides the Joint Board decides as follows:

The installation of induction pre-heating and stress relieving equipment, including the wrapping of coils, is the work of the International Brotherhood of Electrical Workers.

The installation of manufactured resistance coils shall be the work of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry.

The operation of the pre-heating and stress relieving equipment and instruments for pipe welding is the work of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-Fitting Industry.

The decision of the Joint Board is unanimous.

WM. J. MCSORLEY,
L. P. LINDELOF,
ARTHUR H. WELLS,
C. J. ESBENSHADE,
JOHN T. DUNLOP,
Chairman.

CLARIFICATION BY JOINT BOARD NO. 2

FEBRUARY 28, 1949

Board of Trustees,
National Joint Board for Settlement of
Jurisdictional Disputes,
901 Massachusetts Avenue, N. W.,
Washington 1, D. C.

Re: JOINT BOARD NO. 2

Dear Sirs:

Joint Board No. 2 has carefully considered the issues raised by correspondence from the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry and the International Brotherhood of Electrical Workers concerning our decision of September 22, 1948, as directed by the Board of Trustees of January 11, 1949.

The Joint Board finds that the issues now referred to it concerns the unwrapping of induction coils, the handling and moving of the equipment including the secondary cable leads, the installation of water cooled coils and the wrapping of resistance coils—as distinguished from the installation of manufactured resistance coils.

The Joint Board has reviewed the full record of its proceedings, and the recent letters from the two organizations, and has unanimously concluded that

these issues are covered by paragraph one of its decision.

Very truly yours,

(Signed) WM. J. MCSORLEY,
L. P. LINDELOF,
ARTHUR H. WELLS,
C. J. ESBENSHADE,
JOHN T. DUNLOP,
Chairman.

DECISION OF JOINT BOARD NO. 17

Operation of Gasoline Driven Electric Generators for Welding

OCTOBER 27, 1948

In the dispute between the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the International Union of Operating Engineers.

The issue in dispute is the operation of gasoline driven electric generators for welding.

After consideration of the evidence and argument advanced by all parties, the Joint Board decides that the work in dispute is covered by Resolution 124 (American Federation of Labor, Norfolk Convention) and is the jurisdiction of the International Union of Operating Engineers.

The decision of the Joint Board is unanimous.

JOHN E. ROONEY,
L. P. LINDELOF,
FRANK W. BARNES,
CYRIL J. STATT,
JOHN T. DUNLOP,
Chairman.

ASH HOPPERS AND FURNACE BOTTOMS

OCTOBER 6, 1950

The dispute referred to the Hearings Panel, which held its hearing in Washington, D. C., on August 29, 1950, is decided as follows:

The installation of ash hoppers is within the jurisdiction of the Iron Worker; the installation of furnace bottoms is within the jurisdiction of the Boilermakers.

For the purposes of providing a line of demarcation between furnace bottoms and ash hoppers for the purpose of determining the jurisdiction of work between the two trades:

(a) A furnace bottom shall be defined as that bottom part of the furnace or chamber subject to direct and continuous exposure to the fire in the furnace that is air and/or water tight.

(b) An ash hopper is any container for ash which is not subject to direct and continuous exposure to the fire in the furnace whether or not air or water tight.

As stated in the minutes of the hearing of August 29, 1950, the above decision does not affect the recognized jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, United Brotherhood of Carpenters and Joiners of America, Sheet Metal Workers International Association, International Union of Operating Engineers, and the Bricklayers, Masons and Plasterers' International Union of America as stipulated on the record by both the Iron Workers and Boilermakers during the hearing.

(Signed) HARRY C. BATES.
CHARLES AQUADRO.
JOHN T. DUNLOP.

INSTALLATION OF CEILING SYSTEMS

JANUARY 15, 1968

This dispute, which was referred by the National Joint Board on November 23, 1965, was the subject of hearings before the Hearings Panel in Washington, D. C., March 4, 1966, and May 16 and 17, 1966. The decision of the Hearings Panel was issued August 24, 1966, but was stayed because of court litigation until January 15, 1968. The decision of the Hearings Panel, which was upheld by decisions of the U. S. District Court for the District of Columbia, the U. S. Court of Appeals for the District of Columbia Circuit and the Supreme Court of the United States, is as follows:

1. The decision of this Hearihgs Panel is limited to the jurisdictional disputes or work assignments in controversy between lathers and carpenters involved in the installation of ceiling systems. Nothing in this decision shall affect the jurisdiction or work assignment of any other trade, such as, but not limited to, the sheet metal workers, electricians, iron workers, etc., with a claim or interest in the installation of ceiling systems. Contractors shall use this decision as a basis for making work assignments only with regard to work in the installation of ceiling systems involving carpenters and lathers.

2. The installation of gypsum wallboard and other types of panels fastened directly to ceiling joists shall be performed by carpenters. In the event that a carrying channel is used with gypsum wallboard or other types of panels attached thereto, notwithstanding paragraph 4(a) below, the contractor may use carpenters to install the carrying channel in areas not exceeding 300 square feet where there are no lathers on the job.

3. The installation of light iron work in ceiling

systems with gypsum, Portland cement, acoustical or other plasters sprayed-on or trowel-applied over lath or directly to structural members shall be performed by lathers.

4. The following types of ceiling systems are included in this paragraph: Direct Hung Suspension System; Attached Concealed System without Backing Board; Furring Bar Attached System; Furring Bar Suspension System; Indirect Hung Suspension System or similar systems.

(a) The installation of the 1½" channel or similar carrying channel and hangers in any of the above types of systems shall be performed by lathers.

(b) The installation of all other work, including the installation of a ceiling system in its entirety if no 1½" channel or other carrying channel is used, shall be performed by carpenters.

5. This decision shall be effective on all work assignments made on construction contracts let after January 15, 1968.

HEARINGS PANEL

PETER T. SCHOEMANN (Signed)
HUNTER P. WHARTON
WM. E. NAUMANN
ED. S. TORRENCE
JOHN T. DUNLOP
(Impartial Umpire)

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APPENDIX C

Procedural Rules and Regulations of the National Joint Board for Settlement of Jurisdictional Disputes and Appeals Board Procedures

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(Printed October, 1970)

PROCEDURAL RULES AND REGULATIONS OF THE NATIONAL JOINT BOARD

These procedures shall apply to:

(a) Contractors who employ members of the organizations affiliated with the Building and Construction Trades Department, AFL-CIO, and who have signed a stipulation setting forth that they are willing to be bound by the terms of the agreement establishing the Joint Board, or who are members of a signatory association of contractors with authority to bind its members, or who are parties to a collective bargaining agreement providing for the settlement of jurisdictional disputes under the procedures herein set forth. The stipulation form adopted by the Joint Board provides:

"Date .....

In signing this stipulation, the undersigned agrees to be bound by the terms and provisions of the agreement establishing the National Joint Board for Settlement of Jurisdictional Disputes. In particular, the undersigned agrees to be bound by the provision of the agreement which states: 'any decision or interpretation by the Joint Board (or Hearings Panel) shall immediately be accepted and complied with by all parties signatory to this agreement.' This authorization shall run for the term of the agreement, and shall continue in effect for each year thereafter unless specifically terminated at the

renewal date of said agreement which is March 31.

(Signed) _____"

(b) All unions affiliated with the Building and Construction Trades Department, AFL-CIO, in the building and construction industry.

MAINTENANCE OF OPERATIONS ON PROJECTS

To prevent jurisdictional disputes from arising on projects or over method of starting a project, unions and contractors, as qualified and designated herein, are directed to follow the procedures outlined below.

CONTRACTOR'S RESPONSIBILITY

1. Contractors subletting work should stipulate that subcontractors be bound by agreement establishing National Joint Board and its procedural rules in assignment of work.

2. The contractor who has the responsibility for the performance and installation shall make a specific assignment of the work. For instance, if contractor A subcontracts certain work to contractor B, then contractor B shall have the responsibility for making the specific assignment for the work included in his contract. If contractor B in turn shall subcontract certain work to contractor C, then contractor C shall have the responsibility for making the specific assignment for the work included in his contract. It is a violation of the plan for the contractor to hold up disputed

work or shut down a project on account of a jurisdictional dispute.

3. The assignment to be made by the contractor shall be according to the following basis:

(a) Where a decision of record applies to the disputed work, or where an agreement of record between the disputing trades applies to the disputed work, the contractor shall assign the work in accordance with such agreement or decision of record. Agreements and decisions of record are compiled in the "Green Book" published by the Building and Construction Trades Department, AFL-CIO, ("Agreements and Decisions Rendered Affecting the Building Industry"). Where a national agreement between the disputing trades applies that has been filed with the Joint Board and attested by the Chairman, even though not an agreement of record, the contractor shall assign the work in accordance with such agreement. In negotiating such national agreements between International Unions, consultation with the appropriate management groups on the making of agreements between International Unions is desirable and should be carried on.

Decisions of record are applicable to all trades. Agreements of record are applicable only to the parties signatory to such agreements.

(b) Where no decision or agreement under (a) applies, the contractor shall assign the disputed work in accordance with the prevail-

ing practice in the locality. The locality for the purpose of determining the prevailing practice shall be defined ordinarily to mean the geographical jurisdiction of the local Building and Construction Trades Council in which the project is located.

(c) If a dispute has arisen prior to the specific assignment of work where no decision or agreement under (a) applies, or where there is no predominant practice in the locality, the contractor shall nonetheless make a specific assignment according to his best judgment after consulting the representatives of the contesting trades and considering any arguments or facts the trades may wish to present regarding the applicable decisions or agreements of record or practice in the locality. The contractor should also consult any local association of contractors in the locality regarding the established practice.

4. When a contractor has made an assignment of work, he shall continue the assignment without alteration unless otherwise directed by the Joint Board or by agreement between the International Unions involved.

(a) Unloading and/or handling of materials to stockpile or storage by a trade for the convenience of the responsible contractor when his employees are not on the job site, or in an emergency situation, shall not be considered to be an original assignment to that trade.

(b) Starting of work by a trade without a specific assignment by an authorized representative of the responsible contractor shall

not be considered an original assignment to that trade, provided that the responsible contractor, or his authorized representative, promptly, and in any event within eight working hours following the start of the work, takes positive steps to stop further unauthorized performance of the work by that trade.

5. In the event that there is any stoppage of work, or threat of a stoppage, or cessation of operations, arising out of jurisdictional dispute following an assignment of work, the contractor is to notify immediately the Chairman of the Joint Board, 815 16th Street N.W., Washington, D. C. 20006.

Such notice of work stoppage shall indicate:

The contractors
Their addresses
Project
Location
The disputing trades
An account of the events leading to the work stoppage or threatened work stoppage
A full and detailed description of the work in dispute.
The assignment of work that has been made and
The contractor making the assignment.

UNION'S RESPONSIBILITY

1. The agreement provides (Article VI, Section 1) that "Pending a decision by the Board or such settlements as may be arrived at through the office of the Chairman of the Joint

Board, there shall be no stoppage of work arising out of any jurisdictional dispute."

2. When a contractor has made a specific work assignment, all unions shall remain at work and process any complaint over a jurisdictional dispute in accordance with the procedures herein established by the Joint Board. Any union which protests that a contractor has failed to assign work in accordance with the procedures specified above, shall remain at work and process the complaint through its international office. The Joint Board is prohibited from taking action on protests directly from Local Unions or Building and Construction Trades Councils.

3. An International Union may file with the Joint Board a protest against the work assignment of a contractor on a particular project. Such protest of assignment shall indicate the project, the name and address of contractors, location of the project, the disputing trades, an account of events leading to the work assignment, and a full and detailed description of the work in dispute. The International Union shall also indicate the basis of its protest of the assignment by the contractor. The International Union shall cite any decision or agreement of record on which its protest is based. When no decisions or agreements of record are applicable the International Union shall cite the basis for its protest of assignment. Any International Union may also notify the Joint Board of a work stoppage engaged in by another union. The International Union before filing a request for a job

decision shall advise its local union to notify the contractors of its claim for the disputed work and to seek to settle such dispute prior to filing the case with the Joint Board.

When the International Union filing a request for a job decision is directed to comply with the requirement of notification to the employer of a jurisdictional dispute, a compliance notice shall be forwarded to the Chairman of the National Joint Board, who shall forward a copy of such notice to the other union or unions involved in the dispute prior to consideration and decision of the National Joint Board.

4. When an International Union has been directed by the Joint Board to direct the return of men to work, or to furnish men to a project, in a jurisdictional dispute, the General President of the International Union shall promptly comply with the order of the Joint Board. He shall use all the authority of the International Union to secure prompt compliance with a cease-work-stoppage order of the Joint Board.

In line with the intent of the above paragraph, picket lines of a jurisdictional nature must be handled immediately by the Chairman of the National Joint Board. The Chairman, when a jurisdictional picket line is brought to his attention, will immediately send a communication to the Building and Construction Trades Council and to the International whose local has put up the picket line. In addition, a communication will be sent to any other internationals whose local is recognizing the picket line.

5. The following declaration of policy by the Building and Construction Trades Unions is to be observed:

WHEREAS it is recognized that the establishment of picket lines for purposes of objecting to the assignment of work in the building and construction trades results in jurisdictional strikes; and

WHEREAS such picketing and resultant strikes are in violation of the Constitution of the Building and Construction Trades Department; and

WHEREAS it is herewith the unanimous desire of the General Presidents, the Executive Council of the Department, and the officers of the Department to put a stop to all such illegal picketing, we do on this 15th day of July 1952 herewith declare our policy to be as follows:

1. That no Local Union of an affiliated International Union whose International Union's President's signature appears below shall institute or post picket lines for jurisdictional purposes. To do so will result in immediate disciplinary action by the International President of such Local Union.

2. That no Local Building and Construction Trades Council shall authorize or lend support to any picketing for jurisdictional purposes. To do so will result in immediate steps by the Department officers to revoke the charter of such local Building and Construction Trades Council.

3. That in event pickets are posted by any union for jurisdictional purposes it is our de-

clared policy that all unions are to ignore such picket line pending appropriate disciplinary action by the International President of the Local Union posting such picket line.

4. Each International President is to forward a copy of this Declaration of Policy to all his affiliated Local Unions and District Councils.

The Department officers shall forward a copy of this Declaration of Policy to each Local and State Building and Construction Trades Council.

PROCEDURES USED BY THE JOINT BOARD:

A. *Work stoppages and Violations of Procedural Rules.*

1. When the Joint Board has received from a contractor or from an International Union notice of a jurisdictional work stoppage, the Chairman of the Joint Board shall notify the General President of the Union (or Unions) engaged in the work stoppage and shall instruct the General President to direct the members on strike to return to work and to perform their assigned work, and to keep work in continuous operation pending a settlement of the dispute. A copy of such return-to-work instructions from the Chairman shall be sent to the contractor, to the other International Union (or Unions) involved in the jurisdictional dispute, and to the President of the Building and Construction Trades Department, AFL-CIO.

2. When the Joint Board has received notice from an International Union that a contractor subject to the plan for the Settlement of Juris-

dictional Disputes has failed to follow the procedural rules of the Joint Board set forth in the section above on Contractor's Responsibility, the Chairman shall instruct the contractor to comply with the procedural rules in the making of any assignment of work. A copy of such instruction to the contractor from the Chairman shall be sent to the International Unions involved in the dispute over work assignments. These instructions do not constitute a job decision by the Joint Board on the merits of the dispute. They are intended to keep work in continuous operation pending a settlement of the dispute.

B. *Job Decisions.*

When the Joint Board has received a protest of work assignment from an International Union or a request for a job decision from a contractor, it shall proceed to make a job decision as outlined below; provided, however, the Joint Board will not make a job decision in a jurisdictional dispute while there is a work stoppage.

1. Any request for a job decision shall contain the following information:

Name and address of the contractors
Name and l cation of the project
Disputing trades
An account of the events leading to the dispute
The assignment of work made by the contractor
Steps already taken to adjust the dispute
A full and detailed description of the dis-

puted work, including pictures, prints or drawings whenever possible, of the disputed work.

When the request is made by an International Union, it shall also state the basis for the claim of work.

2. An International Union shall file one copy of each request for a job decision.

A contractor shall file an original and three copies of each request for a job decision when two unions are involved and an additional copy for each additional union involved, if any.

3. Notice of such request for a job decision when made by an International Union shall be promptly sent by the Chairman to the other International Union (or Unions) directly involved in the dispute; a copy of the request shall be sent promptly by the Chairman to both (all) International Unions directly involved in the dispute when the request for a job decision is filed by a contractor.

The Chairman, subject to review by the Joint Board, shall have discretion when there is a work stoppage to treat a contractor's request for a job decision as a request to return men to work.

4. When notice of a request for a job decision has been sent to an International Union directly affected, such International Union shall be allowed five business days (except as provided below) in which to state its position to the Joint Board. The International Union shall be notified of this period at the same time it is sent notice of the request for a job decision.

When an International Union requests a job decision and its members remain off the job or hold up disputed work, processing for such decisions shall not start until the International Union has returned its members to work. Upon notification to the Joint Board that the members have returned to work, the usual five-working-day request for position and information will apply.

When a local union remains off the job or establishes a picket line forcing a contractor to request a job decision, and the Joint Board decides that the work in dispute is properly the work of the striking or picketing trade, the effective date of the Joint Board decision shall be delayed by the number of work days the work stoppage or picket line was in effect. For the purpose of this section, computation of the number of days shall start with the date of receipt of the Joint Board notification of the work stoppage or picket line by the International Office of the union involved. During the delay period provided for above, the disputed work shall proceed in accordance with the contractor's original assignment.

5. Where a request for a job decision has been filed with the Joint Board by an International Union, the affected contractor (or contractors) shall be notified and shall be requested to furnish a full description of the disputed work.

6. Where two International Unions have established procedures for the adjustment of jurisdictional disputes without resorting to Joint Board procedures, they shall be allowed

a reasonable length of time as determined by the Chairman of the National Joint Board in which to effect a settlement. If the International Representatives so assigned are unable to reach agreement, they shall jointly render a statement of facts of the dispute to their International Presidents for presentation to the Joint Board for a job decision. (See page 22)

7. (a) Joint Board Procedure. When a dispute is filed, the Joint Board shall in all cases first investigate the claims of the disputing parties to determine whether or not a disposition thereof has been made by a previous decision of record or by recorded agreement between the parties to this dispute and issue a ruling as to the decision or the agreement governing in the case, and determining which one of the parties to the dispute has a rightful claim to the work under the agreement or decision of record.

(b) If the Joint Board finds that the dispute is not covered by a decision or agreement of record, it shall render a job decision, in which the Board should consider the established trade practice and prevailing practice in the locality, and such job decision shall be effective on the particular job only on which the dispute occurred.

(c) When the Joint Board has decided to process a dispute on the basis of "prevailing practice," the International Unions involved shall be allowed ten business days in which to submit such evidence to the Joint Board. The International Unions shall be notified of this

period in each case processed on the basis of "prevailing practice."

Such notice must also include a clear definition of the work on which prevailing practice is to be secured and the locality from which evidence will be received which will be the same for both trades and will be, unless otherwise specified, the geographical jurisdiction of the Local Building and Construction Trades Council in which the project is located. The Joint Board will consider only evidence which identifies projects within this locality and indicates the contractor on the project. It is desirable wherever possible for the evidence to show the year the work was performed and the amount of work involved.

8. Each job decision of the Joint Board shall state that the job decision was predicated upon the particular facts and evidence before the Joint Board regarding the dispute and shall be effective on the particular job only.

9. The affected Unions and contractors shall promptly comply with each job decision of the Joint Board.

10. In the event any contending International Organization or affected contractor feels that a decision rendered by the National Joint Board has been in error, it shall be privileged, within ten working days of receipt of a decision, either (a) to request reconsideration of a National Joint Board job decision upon submission of additional written evidence; or (b) to request an oral hearing on such decision by the National Joint Board, provided that the job decision has been accepted and put into

effect by the affected parties, and further, that such job decision remain in continuous effect until reconsidered or an oral hearing is held by the Joint Board. The Chairman shall determine the matter of compliance with the job decision in question and, if it is found to be in accordance with the job decision, shall set a date for such reconsideration or oral hearing. The contending International Unions, and in cases where the request for reconsideration or an oral hearing has been filed by a contractor, the contractor shall be notified and given opportunity to present written evidence or be heard in the event of an oral hearing. It is permissible at oral hearings for the affected parties to present witnesses. Requests for postponement of an oral hearing must be received by the Joint Board a minimum of forty-eight hours prior to the date scheduled for the hearing.

11. If, during the course of consideration of a dispute, a majority of the members of the Joint Board vote that there is a substantial and material question of fact which cannot be resolved on the basis of the available evidence, the Chairman of the Joint Board shall temporarily suspend the deliberations and appoint a committee of the Joint Board to investigate and report the facts to the Joint Board. The Committee may, in its discretion, proceed to the location of the dispute or may use any other method to secure agreement between the parties to the dispute on the unresolved questions of fact, or make an investigation, on the basis of which it shall make a report as to

the facts in question. The agreed upon statements of facts, or the Committee's report on the facts, shall be forwarded to the Joint Board, which thereupon will resume its deliberations. No more than fourteen (14) calendar days shall be allowed for this step in the procedure.

12. In addition to all other requirements in these Rules and Regulations with respect to the form of job decisions rendered by the National Joint Board, it is also required that any such decision shall include a brief statement of the description of the work in dispute and the conclusions of the Joint Board with respect to the principal material issues which are involved in the dispute. In the event that a decision is made by a divided vote, the minority shall be entitled to present its views in writing and the minority views shall be distributed together with the majority decision.

13. Because efficiency, cost and good management are essential to the wellbeing of the industry the Joint Board should not ignore the interests of the consumer in settling jurisdictional disputes.

C. *Procedural Rules for Joint Board Meetings.*

1. Alternate as well as regular members of the Joint Board may attend and participate in each meeting.

2. No labor member of the Joint Board shall vote or participate on a case involving the organization from which he is appointed; and alternate labor members shall serve in rotation in place of regular members.

3. Voting in the Joint Board shall be by voice vote.

4. The minutes of the Joint Board shall show the action taken by majority vote; they shall not report the vote of individual members of the Joint Board.

5. Each participant shall present its position on a case in writing to the Joint Board, and the Joint Board shall decide the case on such written record.

6. The following procedural rules shall apply in the application of Section 1(e) of Article III of the Agreement:

(a) When an International Union not having direct representation on the Joint Board requests a job decision, or immediately on being advised that its position is required in a case in which a job decision has been requested by another International Union or by a contractor, such International Union shall notify the Joint Board whether it elects to designate its representative to participate in the discussion of such case.

International Unions having representation on the Joint Board may, in the event of prolonged illness or prolonged official absence of such Joint Board member, petition the Joint Board to accept representation on the same basis as unions without direct representation during the illness of such Joint Board member.

(b) A participating or stipulated employer national association not having direct representation on the Joint Board shall notify the Joint Board whether it elects to designate its

representative to participate in the discussion of a particular case.

(c) Such representatives shall be present at the offices of the Joint Board for the first meeting of the Joint Board following the date on which the position of the International Union is due, unless otherwise notified by the Joint Board.

(d) When such a case is called on the agenda at a meeting of the Joint Board, such representatives shall enter the meeting and participate in the discussion of the case. If an International Union or a participating or stipulated employer national association does not notify the Joint Board that it desires to send its representative or if such representative does not appear, the Joint Board shall proceed without such representative.

(e) An International Union or participating or stipulated employer national association not having direct representation on the Joint Board shall be entitled to participate in the discussion preceding a job decision on an appeal from a local plan recognized by the Building and Construction Trades Department.

D. *Locality Decisions*

The Joint Board may, at its discretion, hold oral hearings on repetitive disputes not governed by a decision or agreement of record for the purpose of rendering a decision applying in the locality as defined by the Board. The Joint Board will consider cases for the application of this procedure made by an International

Union, a signatory national contractors' association, or by a stipulated local contractors' association. The Joint Board, however, reserves the right to decide whether to proceed to a locality decision or to continue to process requests in the locality on the disputed items on a job-decision basis.

In any case in which this procedure for a locality decision is invoked by the Joint Board, a ten-day notice of hearing shall be furnished to the affected International Unions and the affected stipulated local contractors' association and affected signatory national contractors' association. The requirements of Paragraph B(12) shall also apply to locality decisions rendered under this Paragraph D.

E. *Compliance Procedure.*

1. When the Joint Board or the Chairman has requested a General President of an International Union to return members to work in a jurisdictional dispute in accordance with the procedural rules of the Joint Board and such members have not been returned to work, or when the Joint Board has rendered a job decision or taken other action and the General President of an International Union or a contractor has not complied with the job decision or action, then the Joint Board in its discretion may invoke the following compliance procedures:

(a) The Joint Board shall request the labor organization or the contractor to show cause at a specified future date, ordinarily one week, why the Joint Board should not find such Inter-

national Union or contractor in noncompliance.

(b) If at the expiration of the specified time period, the union or the contractor has not complied or shown good cause for noncompliance, then the Joint Board shall declare the contractor or the International Union in noncompliance.

(c) When the Joint Board has declared an International Union to be in noncompliance, the Joint Board shall continue to examine cases involving such trade. Job decisions which otherwise would be decided against such trade shall continue to be issued. However, no job decision in any case decided in favor of a trade declared to be in noncompliance shall be issued pending compliance.

(d) When the Joint Board has declared a contractor to be in noncompliance, the Joint Board shall notify the appropriate contractors' association, if any, and such association shall use its authority and influence to secure prompt compliance. Withdrawal from an association does not relieve a contractor of his responsibility and obligation. When a contractor has failed to comply with a job decision or other action of the Joint Board, the contractor shall be directed by the Joint Board to comply with the action or job decision, as required by his stipulation or agreement.

ESTABLISHMENT OF NEW NATIONAL DECISIONS OF RECORD

1. A request for a national decision in a jurisdictional dispute may be filed with the

Appeals Board by any of the International Unions affiliated with the Building and Construction Trades Department or a national participating employers' association. A Hearings Panel shall then be established under Article III, Section 2-4 of the agreement.

2. The Joint Board may at its discretion direct the establishment of a Hearings Panel to establish a national decision in a jurisdictional issue.

3. All General Presidents of National and International Unions affiliated with the Department and all signatory contractors' organizations shall be notified of the establishment of a Hearings Panel and the issue to be considered. All interested parties shall be permitted to intervene.

4. The Hearings Panel shall make every effort to reach a unanimous decision.

5. The national decision rendered by a Hearings Panel shall be promptly complied with by all parties to the agreement.

STATEMENT OF POLICY REGARDING JOINT BOARD DIRECTIVES

The Procedural Rules and Regulations of the National Joint Board provide for the settlement of a jurisdictional dispute on a specific job by agreement or understanding between the International Unions involved. The rules also contemplate that an assignment of work may be changed by the responsible contractor to conform to the terms of same upon notifica-

tion by the Joint Board. Such notification shall be made by means of a directive sent to the responsible contractor(s) by the Chairman of the Joint Board.

In order to give effect to the procedure set forth above, and before a directive may be sent to the affected contractor(s) by the Chairman of the Joint Board, the International Unions involved shall submit for the records of the Joint Board the following information:

I. The date and place of any meeting(s) held in an attempt to settle the jurisdictional dispute and names and affiliations of those present at the meeting(s). A statement of the exact terms of the agreement or understanding reached and jointly signed by authorized representatives of each of the International Unions involved. If separate communications are submitted by the parties, the terms of the agreement or understanding must be identical in each communication. If variations are found, the parties shall be required to reconcile any such differences, and confirm same in writing, before a directive to the contractor(s) is sent by the Chairman.

II. A statement regarding the notification to the responsible contractor(s) of the agreement or understanding reached. If the contractor(s) or representative of same had not been present at the meeting(s), was he furnished with a copy of the agreement or understanding reached? If objection to agreement or

understanding was made by contractor(s) or representative, the nature of the objection must be stated.

III. A copy of the notice or instruction with respect to the agreement or understanding reached as sent by the International Unions to the local unions involved.

In accordance with the Procedural Rules of the Joint Board all directives from Chairman shall be complied with by the affected contractor(s) unless, and within twenty-four hours following receipt of such directive, the contractor notifies the Joint Board that he elects not to comply with the directives and requests that the jurisdictional dispute be processed for a job decision by the Joint Board. Such decision shall be made forthwith on the merits of the case.

Effect of Appeal to the Appeals Board

When an appeal is taken to the Appeals Board from a job decision or interpretation of the Joint Board, such job decision or interpretation shall not take effect until the Appeals Board has acted. If the Joint Board decision or interpretation is modified or reversed, the parties to this Agreement shall immediately comply with the Appeals Board action.

The provisions of Paragraph B(9) (Page 14) and E (Pages 19-20) shall apply to decisions of the Appeals Board in the same manner as they apply to job decisions of the Joint Board.

APPEALS BOARD
STATEMENT OF PROCEDURES

The revised machinery for the settlement of jurisdictional disputes in the building and construction industry, as incorporated in the agreement effective April 3, 1970, provides for the establishment of an Appeals Board. Article II, Section 5 states in part:

> "The Appeals Board is empowered to review and decide any appeal from a decision or ruling of the National Joint Board or a Local Board recognized under Article IV [New York, Chicago and Boston] and such decision of the Appeals Board shall be final. The jurisdiction of the Appeals Board shall be discretionary and it is authorized, subject to the approval of the Joint Negotiating Committee, to prescribe rules as to the types of cases which it will accept for review. No decision of the Appeals Board shall be considered as part of the record referred to in Article III, Sec. 1(c) of this plan. The Appeals Board shall have the authority, subject to the approval of the Joint Negotiating Committee, to establish such procedural regulations as may be required for the effective administration of this appeals procedure. . . ."

The revised procedural rules and regulations of the National Joint Board for the Settlement of Jurisdictional Disputes, as approved by the Joint Negotiating Committee, contain the following section entitled "Effect of Appeal to the Appeals Board":

"When an appeal is taken to the Appeals Board from a job decision or interpretation of the Joint Board, such job decision or interpretation shall not take effect until the Appeals Board has acted. If the Joint Board decision or interpretation is modified or reversed, the parties to this Agreement shall immediately comply with the Appeals Board action."

APPEALS BOARD PROCEDURAL REGULATIONS

The Appeals Board cannot anticipate at the outset of its operations the full range of procedural questions that may arise in carrying out its functions under the revised plan for the settlement of jurisdictional disputes. Subject to the approval of the Joint Negotiating Committee, the Appeals Board presents hereinafter a preliminary statement of its procedural regulations with the understanding that they shall be reviewed and revised in the light of experience, but only in keeping with the plan.

1. No request for consideration of an appeal from a job decision of the National Joint Board or from a recognized plan for local settlement (New York, Chicago and Boston) made after April 1, 1965 may be filed with the Appeals Board while a request for reconsideration or clarification is pending before the National Joint Board or the machinery of such recognized local plan. An appeal may be filed from a job decision or a decision on a request for reconsideration, clarification or a decision fol-

lowing an oral hearing. Parties may not have proceedings in process in the same case in both the Appeals Board and the National Joint Board or a recognized local board.

2. A request to consider an appeal may be filed with the Appeals Board by the following parties:

(a) International unions involved

(b) Contractors involved or directly affected

(c) National contractor associations with members involved or directly affected

3. A request to consider an appeal shall be filed in writing with the Appeals Board, Plan for Settlement of Jurisdictional Disputes, Building and Construction Industry. The address is 1012 14th St., N.W., Washington, D. C. 20005. Tel. ST 3-0040 (Room 1104).

(a) Any request to consider an appeal from the National Joint Board must be filed no later than three (3) working days after the date of the letter transmitting the decision to the affected parties. Such request shall include a copy of the decision from which an appeal is requested, a statement of the facts and a description of the work operation, with a statement of the reasons for the appeal. (The full file of the National Joint Board shall be available to the Appeals Board.)

(b) Any request to consider an appeal from a recognized plan for local settlement (New York, Chicago and Boston) must be filed no later than five (5) working days after the date of the letter transmitting the decision to the affected parties. Such request shall

include a copy of the decision from which an appeal is requested, a statement of the facts and a description of the work operation, with a statement of the reasons for the appeal.

(c) Any party filing a request to consider an appeal from either the National Joint Board or a recognized plan for local settlement shall file concurrently a copy of such appeal by wire with each of the (other) contractors involved and each of the (other) unions involved. In this way all interested parties will have simultaneous notice of the appeal. In appeals from Local Board and Joint Board decisions, supporting documents may be forwarded to the Appeals Board by mailing same within one working day after the expiration of the appropriate appeal period.

4. In the case of any petition for an appeal filed from a decision of a recognized local board (New York, Chicago and Boston) the decision of such local board shall be placed into effect before the request for consideration of an appeal is filed. A request to consider an appeal from a decision of the National Joint Board constitutes a stay of such decision.

5. The Appeals Board shall promptly review any request to consider an appeal. It may or may not seek the views of the other involved parties before deciding whether or not to consider the appeal. The plan specifically provides that "the jurisdiction of the Appeals Board shall be discretionary. . . ." If the Appeals Board rejects the consideration of the appeal, the decision of the National Joint Board shall

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promptly be placed into effect. The decision of the recognized local boards shall continue in effect. The rejection of the consideration of an appeal by the Appeals Board is not to be construed as constituting any ruling on the merits of a dispute nor does it prejudice a further request for consideration of an appeal on a similar case in the future.

6. In exercising its discretion as to whether or not to accept a particular appeal, the Appeals Board will give consideration to such factors as the significance of the dispute, the frequency with which such disputes have arisen, the contribution a decision may make to the resolution of disputes and the improvement of relations, and the reasons advanced for considering the appeal. The Appeals Board may not be able as a matter of time to consider all requests for appeal, particularly in its early stages of operation, and accordingly must establish some priority among possible appeals. The Appeals Board is authorized, subject to the approval of the Joint Negotiating Committee, "to prescribe rules as to the types of cases which it will accept for review"; the Appeals Board may establish such types of cases in the future.

7. When the Appeals Board has decided to accept an appeal, it shall promptly set a date for the consideration of the case and notify all involved parties. The Appeals Board shall indicate the date and place of any hearing or specify other procedures it will follow in considering the appeal.

8. The decision of the Appeals Board shall

be communicated to all involved parties; its decision shall be complied with at once.

9. The decisions arising from appeals handled under the procedures outlined above shall apply to the particular jobs involved in the appeal and shall not be considered as a part of the record as defined in Article III, Section 1 (c) of the Plan.

10. All problems of work stoppages or procedural questions regarding assignments of work shall be handled by the Joint Board.

Local Recognized Boards

The Appeals Board requests each of the recognized local plans for settlement of jurisdictional disputes (New York, Chicago and Boston) to provide full information on procedures and standards used in the making of decisions. The Appeals Board may seek conferences with the recognized local boards to facilitate the handling of disputes and to reduce the number of appeals.

Hearing Panels—National Decisions

1. Article III, Section 2 of the Plan provides:

"When a dispute is filed with the Appeals Board by a National or International Union, with a specific request for a decision on a national basis which would become part of the record, the Board shall review the request, and if the Board finds it is an issue not already determined on a national basis by a decision or agreement of record, it shall refer the issue to the Impartial Umpire who shall call a con-

ference of the General Presidents of the Unions involved for the purpose of determining whether or not a national agreement is possible. If an agreement is concluded and properly signed by the contesting parties and attested by the Impartial Umpire, the terms and provisions of the agreement shall remain in effect as per the provisions of the Constitution of the Department. In the event that the dispute cannot be settled by agreement or is not settled by agreement at the end of six months, the Impartial Umpire shall docket the case for hearing and decision by a hearings panel. . . ."

The Plan further provides:

"In negotiating national agreements between international unions, consultation with the appropriate management groups on the making of agreements between international unions is desirable and should be carried on."

2. Article III, Section 5 of the Plan provides:

"The Joint Board may at its discretion and after conference between contesting unions, held by the Chairman of the Joint Board, refer a repetitive dispute which it finds not to be governed by a decision or agreement of record to the Impartial Umpire for mediation and the establishment of a hearings panel and a national decision."

The above Statement of Procedures of the Appeals Board as hereby amended were confirmd by the Joint Negotiating Committee on October 6, 1970.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-63

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

No. 70-65

TEXAS STATE TILE & TERRAZZO COMPANY, INC. ET AL., *Petitioners*

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT, PLASTERERS' LOCAL UNION NO. 79

STATEMENT OF THE CASE

A. Facts

For the purposes of argument in this Court, a detailed statement of the facts is unnecessary. Generally, the NLRB's statement (Brief at 4-7) is accu-

rate,[1] but neither it nor the Petitioner Texas State Tile do justice to the decision of the Court of Appeals.

B. National Labor Relations Board Proceedings

Although the NLRB stated in its decision that it weighed all the relevant factors presented, it ignored certain factors stressed during the hearing (*e.g.*, A. 183-95),[2] and generally implied it was giving controlling weight to the collective bargaining agreements between the Tile Setters and the employers (A. 23). The NLRB affirmed the employers' assignments to the Tile Setters.

C. The Decision of the Court of Appeals

The Court of Appeals (Judge Leventhal joined by Judge McGowan, with Judge MacKinnon dissenting) refused to enforce the NLRB's order. The court relied on this Court's decision in *NLRB* v. *Radio and Television Broadcast Engineers Union,* 364 U.S. 573 (1961),[3] the language of the statute and the legislative

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[1] One significant omission is that when the Tile Setters continued to claim that they did not fully understand the Joint Board award of November 9, 1966, the Plasterers requested the Joint Board to clarify its earlier award (A. 365; 331, 334-43). The Joint Board, on March 15, 1967, clarified its award with a detailed exposition of the work assigned to each trade under any circumstances (A. 365; 341-43, 324-26). The decision of the Joint Board did not award the Plasterers all the work that was claimed. The Joint Board recognized "the problems created by having two different trades working at the same time on separately identifiable work operations," so, "in the interest of efficient job operation," it assigned the work based on method of installation (A. 365 n.6; 341-42). The picketing on the Martini job occurred two days after the Joint Board issued its clarification (A. 366).

[2] The "Guide Specification" referred to in the testimony is part of the record as Plasterers Exhibit 20P.

[3] Hereinafter referred to as "*CBS.*"

history, to find that the Board lacked authority under § 10(k) "to determine the merits of a jurisdictional dispute between two unions when the unions had agreed on a method for binding arbitration of their disputes"—here, the Joint Board (A. 370). The court immediately recognized that in *CBS* this Court settled the meaning of the word "dispute" in § 10(k) as being the "dispute between two or more groups of employees" (A. 374), and that it necessarily follows that the "parties" to the dispute are the disputing unions or groups of employees. The court held that under § 10(k) an employer is not a party to the jurisdictional dispute and therefore he is not indispensable to the voluntary adjustment mechanism.[4]

Tracing the legislative history, Judge Leventhal found that the scheme of the Act commands the result reached, and furthermore, that policy considerations reinforce his conclusion that the voluntary mechanism clause of § 10(k) is meant to be operative once the disputing unions agree on a method of settlement of their dispute.

Judge MacKinnon, in dissent, was persuaded by the NLRB's twenty-one years of contrary administrative precedent, and viewed the legislative history and a "singe sentence in a 1961 Supreme Court decision [*CBS*]" (A. 389) as not supporting the conclusion of the majority.

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[4] In view of its ruling, the Court did not have to reach the actual merits of the jurisdictional dispute between the unions (A. 362 n. 3).

SUMMARY OF ARGUMENT

I

The starting point in any case of statutory interpretation is the language of the statute. The issue here is whether an employer is a *sine qua non* to the voluntary settlement procedures expressly contemplated by § 10(k) of the Act. This turns on whether "parties to the dispute" refers to the inter-union controversy over who is entitled to take up the work assignment issue with the employer, or to the broader employer-union controversy over the work assignment. The NLRB doctrine depends on the latter view, which encompasses the theory that "dispute" means the jurisdictional strike. The last sentence of § 10(k) states that the charge will be dismissed upon compliance by the "parties" to the § 10(k) award. But the employer can be in "non-compliance" by resisting the union's demand, and yet the charge will be dismissed. It follows that Congress did not consider the employer a "party." Also, the "dispute out of which such unfair labor practice shall have arisen" cannot refer to the jurisdictional strike, for that strike *is* the unfair labor practice. Thus the "dispute" from which the strike "arises" can only be the jurisdictional dispute between the two unions.

II

For fourteen years after the Act was passed, the NLRB administered § 10(k) in error. The NLRB's fundamental interpretation of the Act was overturned in *CBS* in 1961. In *CBS* this Court specifically stated that the "dispute" referred to in § 10(k) was the jurisdictional dispute between the two employee groups. This reversed the NLRB's theory that an

equivalence between "strike" and "dispute" permitted the NLRB to limit the § 10(k) inquiry to whether the union could strike because of an NLRB order or certification. The *CBS* rationale thus controls this case.

The legislative history is in full support of *CBS* and contrary to the NLRB doctrine. Reference upon reference is made to the fact that § 10(k) was intended to cover disputes between two unions. The voluntary adjustment clause of § 10(k) is supported on the ground that it will stimulate unions to set up appropriate machinery to settle such controversies within their own ranks. No one suggests that employers will be a necessary party to this machinery.

The theory of the Taft-Hartley Act is non-interference by Government in substantive employment conditions. The work assignment issue is of central importance to employees, because job security depends upon it. Congress recognized the dilemma of an employer caught in a strike between two unions over a work assignment: the employer has no option open to resolve the issue. Thus Congress set out to extract the inter-union aspect of the work assignment controversy. One union is taken out of the picture by inter-union settlement, or as the compulsory alternative, by a § 10(k) hearing. The NLRB's doctrine that the employer is an indispensable party to the voluntary settlement needlessly destroys the unions' right, guaranteed by § 10(k), to settle their dispute short of administrative arbitration. The employer has no interest to protect since he is not bound by the § 10(k) decision.

III

The NLRB's obedience to consistency highlights its error. The doctrine began as a footnote in an NLRB

case, devoid of any analysis. It has always been an issue ancillary to the NLRB's understanding of § 10 (k) which was reversed in *CBS*. The failure to reconsider the doctrine after its underpinnings were removed by *CBS* destroys any entitlement to judicial respect.

The NLRB doctrine actively induces employers not to participate in voluntary adjustment procedures. Where an employer refuses to so participate, he not only has a chance that his preference will be upheld in the inter-union settlement, but he has over a 95% probability of having his preference upheld by the NLRB. The results are twofold. The employer is induced to stay away from the only procedure which will bind him and bring complete industrial peace, and when the NLRB does overturn the inter-union settlement, as *CBS* feared, the disappointed losing union will probably continue to harass the employer short of striking.

Petitioners argue that it is inherently unfair to "bind" the employer to a voluntary settlement in which he has not participated. Forced to admit the employer has no legal obligation to comply with the voluntary settlement even if the NLRB defers to it, Petitioners argue the employer is "bound practically" because the winning union can strike over the work assignment. In its zeal to protect the employer, the NLRB has not only made an unsupported assumption of union power, but by administrative fiat has taken from the union what Congress could not be persuaded to take in 1947.

ARGUMENT

INTRODUCTION

Between 1949 and 1961, a line of NLRB cases developed holding that the NLRB need make no affirmative award between two unions in a § 10(k) hearing. An ancillary holding in that line of cases was that the employer is an indispensable party to a pre-§ 10(k) voluntary settlement. In *CBS* this Court unanimously reversed the NLRB's refusal to make an affirmative assignment, thereby overturning the NLRB's fundamental understanding of § 10(k). Since *CBS,* the NLRB has nonetheless continued to adhere, without re-examination, to its ancillary doctrine that the employer is a *sine qua non* to any "voluntary adjustment of the dispute." That doctrine is at issue in this case.

In Part I, below, we show the NLRB's adherence to this doctrine is inconsistent with the language of § 10(k); and in Part II that it is inconsistent with (a) *CBS*; (b) the legislative history; and (c) the underlying theory of the statute. In Part III, we show the NLRB's doctrine is contrary to a policy of industrial peace and stability through the private settlement of disputes, and that Petitioners' attempt to support the doctrine is unsuccessful.

I. THE LANGUAGE OF § 10(k) IS DISPOSITIVE

The obvious starting point in statutory interpretation is the language of the statute. Section 10(k) states:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of Section 8(b), the Board is empowered and directed to hear and

> determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the *parties to such dispute* submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the *parties to the dispute* with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed. (emphasis added.)

The nub of contention in this case is whether the term "parties" includes the employer, and whether the term "dispute" refers to the inter-union controversy over work assignment or to the jurisdictional strike. The terms are mutually dependent. We contend that "parties" refers to two unions arguing between themselves over which one is entitled to do a work assignment, and that "disputes" refers to this argument between the two of them. The NLRB has an expanded definition. It says that "dispute" refers to a jurisdictional strike and thus includes the employer as well as the two unions. The language of § 10(k) cuts squarely against the NLRB in all respects.

The final sentence of § 10(k) settles the issue.[5] It says that the § 8(b)(4)(D) charge will be dismissed if the "parties to the dispute" comply with the decision of the Board in the § 10(k) hearing or the voluntary adjustment. But compliance or non-compliance by the *employer* has absolutely no bearing on this dismissal. If the employer's preference is not upheld, the

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[5] Significantly, in quoting § 10(k), both the NLRB (Brief at 14) and Texas State Tile (Brief at 14, 20) omit the last sentence of § 10(k).

winning union can comply with the § 10(k) decision and strike the employer; the § 8(b)(4)(D) charge against the union will then be dismissed, even though all the time the employer is steadfastly resisting the Board's § 10(k) award.[6] The employer will not be complying in any sense of the word.

The meaning of "parties" and "dispute" does not change between the first and second sentences of § 10 (k). Since compliance by the "parties to the dispute" in the last sentence does not include the employer, obviously "parties to such dispute" in the previous sentence does not include the employer either. This is the short, yet controlling, answer to this case. The NLRB's treatment is clearly inconsistent with the language.[7]

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[6] The NLRB admits this (Brief at 23 n.16).

[7] Texas State Tile argues (Brief at 22-24, 29) that since § 8(b)(4)(D) prohibits a strike over a work assignment to "another trade, craft or class," it meant to extend protection to disputes solely between one union and the employer. The NLRB has held otherwise. *See, e.g., Teamsters Local 107 (Safeway Stores, Inc.)*, 134 NLRB 1320 (1961); *Local 1905, Carpet, Linoleum Layers (Butcher and Sweeney Const. Co.)*, 143 NLRB 251 (1963). But in any event, the argument is misplaced. By this language of inclusion, Congress was merely making sure that a dispute between two militant groups of employees over a work assignment would be covered by § 8(b)(4)(D) without regard to whether or not either group was affiliated with a "labor organization" in the technical sense. The Texas State Tile argument depends on the assertions of its footnote 13 (Brief at 23), that "[t]he unrepresented employees are not an entity, have no organization or structure, and have no background or competence to dispute the union's claim for work or to represent themselves in any dispute-settling mechanism." Such assertion is unwarranted and has no support in the legislative history. Texas State Tile cites no case wherein the NLRB has applied this language of inclusion, thus demonstrating its limited applicability.

Another portion of § 10(k) supports our position:

> [T]he Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen . . . .

If "dispute" equals "strike" (as the NLRB contends), the NLRB will actually "hear and determine" the strike at the § 10(k) hearing. But the procedure doesn't work that way. Only the merits of the inter-union jurisdictional claims are actually decided in the § 10(k) hearing; a subsequent § 8(b)(4)(D) hearing is held to decide if there was a strike or strike threat. The first operative portion of § 10(k) is contrary to the NLRB's definition of "dispute."[8]

The language of § 10(k) refers to the dispute out of which the unfair labor practice "shall have arisen." Most certainly the strike is the actual "unfair labor practice," and no unfair labor practice "arises out of" the strike. After the strike commences, someone will "charge" the commission of an unfair labor practice, and the NLRB may "find" that it has been committed. An actual physical substitution best shows the signifi-

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[8] The Laborers suggestion (Brief at 29-30) (citing *Local 283, UAW* v. *Scofield*, 382 U.S. 205 (1965)) that the employer is a "party" in § 10(k) terms because as a "charging party," in NLRB vernacular, it could intervene in court proceedings, is misplaced. The two notions of "party" are completely unrelated. For example, the NLRB concedes that when the employer responsible for the work assignment is bound to the voluntary settlement procedures, the NLRB, under its present doctrine, will dismiss the § 8(b)(4)(D) charge (Brief at 23 n.16; 28 n.21). But the employer is not necessarily the charging party. In the instant case, if the employer responsible for the work assignment (Texas State Tile) had been stipulated to the Joint Board, no § 10(k) hearing would have been held even though the charging party (Southwestern Construction Company) had never so stipulated.

cance of this; thus if we substitute the term "strike" for "unfair labor practice" the first sentence reads:

> The Board is empowered and directed to hear and determine the dispute out of which such "strike" shall have arisen.

Obviously, "strike" and "dispute" are two different things, and the NLRB's premise that "dispute" includes the strike is wrong.

The dissenting Judge below also claimed that "dispute" refers to "the jurisdictional *strike*" (A. 393; emphasis in the original).[9] The NLRB criticizes the majority opinion for disagreeing with this construction:

> The contrary conclusion of the court below, which construed the term "such dispute" in Section 10(k) as referring to the underlying jurisdictional dispute, ignores the fact that, under the statutory scheme, Section 10(k) does not become operative unless the union seeking the work has implicated the employer in the jurisdictional controversy by exerting strike pressure against him. (footnote omitted) See *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 263-264. (NLRB Brief at 26).

[9] The only argument the NLRB (Brief, at 26-27) makes in support of its reading of the § 10(k) language is that §§ 8(b)(4)(D) and 10(k) do not become operative until there is a strike, therefore (according to the NLRB), the employer is obviously a "party" to the "dispute." See also Texas State Tile Brief at 20-22. While the premise is faultless, the conclusion does not follow. We showed above that the term "dispute" could only mean the inter-union dispute, to which the employer is not a "party." Also, Congress did not set out to decide all work assignment controversies; it only stepped in where the employer was the victim of a whipsaw strike. The fact that the strike was made the actual unfair labor practice doesn't mean that the employer is a party to the inter-union dispute out of which the strike arose.

But it is the majority view which is correct, for it was based upon this Court's construction in *CBS*:

> And the clause 'the dispute out of which such unfair labor practice shall have arisen' can have no other meaning except a jurisdictional dispute under § 8(b)(4)(D) which is a dispute between two or more groups of employees over which is entitled to do certain work for an employer. 364 U.S. at 579.

Judge Leventhal makes perfectly clear that his construction of "dispute" was based upon this passage (A. 374). Yet the NLRB, in disputing Judge Leventhal's view, fails even to accord him the authoritative precedent in this Court on which he relies. Instead, the Board cites a passage from *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 263-64 (1964) which addresses itself to a broader notion, and not to the term "dispute" in Section 10(k) at all.[10]

II. THE NLRB's INTERPRETATION AT ISSUE HERE WAS REJECTED IN CBS AND BY CONGRESS AND CUTS AGAINST THE PURPOSE OF SECTION 10(k)

A. CBS

In *CBS* this Court decided once and for all the interrelationship of § 10(k) and § 8(b)(4)(D), thereby correcting fourteen years of NLRB error. In this case, the NLRB is trying to salvage part of the issue lost

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[10] In the cited passage in *Carey*, this Court distinguished between two types of "jurisdictional disputes"—those which deal with work assignments and those that are really questions of representation. The latter, of course, are not governed by § 10(k) at all, but by § 9 of the Act. *Carey* did not consider what Congress meant by "dispute" in § 10(k); nor did it purport to alter the construction of that term in *CBS*. The Texas State Tile contention (Brief at 21, 43) that these opinions somehow cancel each other out is thus without merit.

in *CBS*. That is why the NLRB draws back from the plain language of § 10(k).

Congress had the option in 1947 of flatly prohibiting jurisdictional strikes, but it did not adopt that approach. Congress decided "that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions." *CBS,* 364 U.S. at 576-77. It accomplished this goal by tempering the § 8(b)(4)(D) strike prohibition with § 10(k), which provides that the two unions or the NLRB will, in effect, extract the inter-union aspect from the broader controversy over who will ultimately receive the work. Section 10(k) tells the two unions to put their own house in order by a private settlement,[11] and send back only *one* union to take up the issue with the employer. If the unions cannot settle it themselves, the NLRB decides in a § 10(k) hearing which union is free to dispute the work assignment. The employer is then free to accede to the union's demand, face the union down or compro-

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[11] Both Petitioners, and especially the *amicus curiae* brief of the Laborers, have attacked the National Joint Board. They apparently wish to put this case in a posture where the issue is a preference between the NLRB or the National Joint Board. That is not the issue. There are many conceivable private forums for the settlement of the inter-union disputes, and many industries besides building and construction will be affected by this case. Since *CBS* in 1961, only half of the NLRB's § 10(k) determinations have involved the building and construction industry (Figures obtained from office of the General Counsel, NLRB). The National Joint Board is only one private forum, and this case decides an issue applicable to all. We point out later in this brief that private settlement forums are far preferable to the NLRB in terms of flexibility, speed of decisions and powers of enforcement. See pp. 35-39 *infra*.

mise, or endure a strike. The employer is free of the dilemma of having no open option which will satisfy both unions. The union, on the other hand, is not guaranteed the work assignment.

The NLRB administered the statute in error for fourteen years. It maintained the right to affirm the employer's work assignment in every case except where the employer acted contrary to an NLRB order or certification. The NLRB always sent the union which had the employer's assignment back to take up the issue with the employer. When this doctrine reached this Court in *CBS,* the NLRB's practice was unanimously reversed. This Court recognized that the NLRB practice was the surer way of prohibiting strikes, but held that the Congressional emphasis on settling the inter-union dispute over the work assignment was controlling until legislated otherwise. As the Court put it in *CBS*:

> [Section] 10(k) offers strong inducements to quarrelling unions to settle their differences by directing dismissal of unfair labor practice charges upon voluntary adjustment of jurisdictional disputes. 364 U.S. at 577.

It amplified this statement by saying that in the case before the Court, the technicians' union "failed to reach a voluntary agreement with the stage employees union so the Board held the § 10(k) hearing as required to 'determine the dispute'." 364 U.S. at 577.

Later in *CBS,* the Court said:

> And the clause 'the dispute out of which such unfair labor practice shall have arisen' can have no other meaning except a jurisdictional dispute under § 8(b)(4)(D) which is a dispute between two or more groups of employees over which is entitled

to do certain work for an employer. 364 U.S. at 579.

This construction of "dispute" was essential to the *CBS* decision. The NLRB was treating "strike" and "dispute" as equivalent and limiting its § 10(k) determination to the narrow question of whether under an NLRB order or certification the union had the right to strike. *CBS* reversed this by holding in the foregoing language that the "dispute" was not the strike, but the controversy between the two unions. As the majority below recognized, once this is established, "it follows that these employee groups are 'the parties to such dispute' for the purposes of determining whether there exists a voluntary adjustment procedure within the abstention provision of 10(k)." *CBS* is authoritative and should govern here.[12]

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[12] The thrust of § 8(b)(4)(D) was again underscored in *National Woodwork Mfrs. Ass'n.* v. *NLRB,* 386 U.S. 612, 625-626 (1967):

> The other subsections of § 8(b)(4) of the Act were similarly limited to protecting employers in the position of neutrals between contending parties. . . . The prohibition of subsection (D) against coercion to force an employer to assign certain work to one of two unions contesting for it protects the employer trapped between two claims. The central theme pervading these provisions of protection for the neutral employer confirms the assurances of those sponsoring the section that in subsection (A) Congress likewise meant to protect the employer only from union pressures designed to involve him in disputes not his own (footnote omitted).

Both the NLRB (Brief at 22) and the Laborers (Brief at 13, 14) cite briefs prepared by Professor Archibald Cox in 1957 when Professor Cox was acting as an advocate for the National Joint Board. They would thus make it appear that Professor Cox supports their position. But Professor Cox was battling against the NLRB's pre-*CBS* interpretation of § 10(k), and the NLRB's myopia forced Professor Cox to take one step at a time. It must be remembered that Professor Cox was acting in a limited role, and could not necessarily give full voice to his view of the legislation.

B. The Legislative History

The legislative history has not changed since *CBS*. The context in which the problem was presented to Congress, the approach of the legislation, and the statements of the Congressmen all support *CBS's* finding that the limited purpose of § 10(k) was to force the two unions to settle their disputes by private or administrative means when the dispute generated a whipsaw strike.

In his 1947 State of the Union message, President Truman asked Congress to adopt labor legislation which would settle the inter-union aspects of disputes over work assignments. He stated:

> Another form of inter-union disagreement is the jurisdictional strike involving the question of which labor union is entitled to perform a particular task. When rival unions are unable to settle such disputes themselves, provision must be made for peaceful and binding determination of the issues. (93 Cong. Rec. 136 (1947)).

The initial House approach was a blanket prohibition of strikes growing out of unresolved disputes between unions.[13] In the Senate, Senator Morse introduced a bill containing the same language as § 10(k), with one exception.[14] Senator Morse made it clear that the pro-

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[13] I Leg. Hist. 78; H.R. Rep. No. 245 on H.R. 3020 (I Leg. Hist. 292, 314). "Leg. Hist." refers to the entire legislative history bound into two volumes by the Government Printing Office.

[14] The bill which passed the Senate proposed the NLRB hear and determine the inter-union dispute just as the present § 10(k) provides but it also permitted the NLRB to appoint an arbitrator to decide the inter-union dispute if the two unions could not agree on a method of adjustment. H.R. 3020, I Leg. Hist. 258-59. In Conference, the authority of the NLRB to appoint an arbitrator to

vision for voluntary settlement of jurisdictional disputes was meant to include only the disputing unions or groups of employees—not the employer. The idea of § 10(k) developed from the Senator's experience with jurisdictional disputes while a member of the War Labor Board. He explained to Congress that the War Labor Board had adopted a policy whereby:

> [W]e would give union leaders involved in jurisdictional disputes 24 hours to proceed to settle the dispute without a work stoppage, and upon their failure to do so we would appoint an arbitrator whose decision would be final and binding. II Leg. Hist. 983.[15]

This was the genesis of § 10(k). Senator Morse wanted the Act to provide the same incentive used by the War Labor Board to encourage disputing unions to agree between themselves on voluntary methods of

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hear disputes was deleted from Section 10(k) without explanation, but the remainder of Senator Morse's provision was retained. See H.R. Conf. Rep. No. 510 on H.R. 3020 (I Leg. Hist. 505, 534, 561). The Conference bill then passed both Houses.

Since the deletion of this item was done without comment, the reason is unclear, but it cannot have the significance which Texas State Tile (Brief at 16, 26-27) attributes, because the direction that the NLRB defer to a private mode of settlement remained unchanged.

[15] Senator Morse added:

> [P]robably one of the greatest benefits that will come from the adoption of such amendments to the Wagner Act as I am proposing this afternoon will be action on the part of the unions themselves to see to it that it does not become necessary, unless in exceptional cases, to resort to the machinery which I have proposed in these amendments . . . because the unions themselves will proceed to establish within their own organizations machinery capable of settling such disputes short of economic action. II Leg. Hist. 983.

settlement of jurisdictional disputes—the Board and arbitrators to be alternatives in the event the unions could not settle their differences.[16] Senator Morse crystallized the meaning of the voluntary settlement procedures of Section 10(k) when he explained his reasons for opposing the Conference bill which did not contain his provision for the appointment of arbitrators in § 10(k). He stated:

> It certainly is true, I am perfectly willing to confess it, Mr. President, that I propose in my bill, and I now defend, a procedure which in the last analysis says to labor, 'If you cannot settle a jurisdictional dispute between the two unions involved without strike action then you must submit that issue to compulsory arbitration.' (II Leg. Hist. 1554).

Senator Murray, in urging the adoption of § 10(k), as proposed by Senator Morse, explained his understanding of the provision:

> We believe this provision of the bill to be sound, and are pleased to note that full opportunity is given the parties to reach a voluntary accommodation without governmental intervention if they so desire. *We are confident that the mere threat of governmental action will have a beneficial effect in stimulating labor organizations to set up appropriate machinery for the settlement of such controversies within their own ranks, where they properly should be settled.* II Leg. Hist. 1046 (emphasis added); See also Sen. Min. Rep. No. 105 on S. 1126 (I Leg. Hist. 463, 480).

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[16] Texas State Tile appears to argue (Brief at 38-39) that Senator Morse only intended to give effect to pre-strike inter-union settlements. If this is so, the voluntary adjustment portion of § 10(k) is rendered meaningless. Section 10(k) is devoid of such a limitation.

In conference the Senate approach was adopted. In recommending adoption of § 10(k), the House Conference Report stated:

> The Senate amendment also contained a new section 10(k), which had no counterpart in the House bill. This section would empower and direct the Board to hear and determine *disputes between unions* giving rise to unfair labor practices under Section 8(b)(4)(D) (jurisdictional strikes). H.R. Conf. Rep. No. 510, on H.R. 3020 (I Leg. Hist. 561) (emphasis added).[17]

Nowhere in the legislative history do we find anyone suggesting that a work assignment decision is a management prerogative deserving protection from union interference. As a contrast, consider the views of the *amicus* brief of the Scientific Apparatus Makers Association. The legislative history is significantly devoid of any similar concern.

C. The Thrust of Section 10(k)

Of course, the language of § 10(k) and the legislative history reflect the sole purpose of federal labor legis-

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[17] See also, II Leg. Hist. 950, 1554 (Senator Morse); II Leg. Hist. 1157 (Senator Smith); II Leg. Hist. 995 (Senator Lucas); and I Leg. Hist. 615 (Rep. Hartley). This Congressional intent is further underscored by the repeated references in the debates to the admissions of many labor leaders that jurisdictional strikes were intolerable situations demanding corrections. *See, e.g.*, I Leg. Hist. 315 (H.R. Rep. No. 245 on H.R. 3020); II Leg. Hist. 1377 (Senator Hawkes). Yet there is no labor leader who would say, or ever has said, that work assignments are not a legitimate interest of unions and that resolution of work assignments (absent an inter-union factor) should not be a proper subject of economic interplay between employers and unions.

lation[18]—to provide a framework free of coercion in which employers and employees can hammer out the terms and conditions of employment. As Professors Cox and Bok have written:

> The Wagner Act left substantive terms and conditions of employment entirely to private negotiation. The Act did not fix wages, hours or other conditions of employment. It did not authorize any administrative tribunal to fix them. When a dispute arose concerning substantive terms and conditions of employment, the Act provided no governmental machinery for its adjustment. The basic theory of the law in its original form, as today, was that the arrangement of substantive terms and conditions of employment was a private responsibility from which the government should stand apart. It was hoped that the process of collective bargaining would result in a lessening of industrial strife, but no one supposed that strikes would not occur. In the end the force which makes management and labor agree is often an awareness of the costs of disagreement. The strike is the motive power which makes collective bargaining operate. Freedom to strike, the threat of strike and possibly a number of actual strikes are, therefore, indispensable parts of a national labor policy based upon the establishment of wages, hours and other terms and conditions of employment, by private collective bargaining. A. Cox & D. Bok, Cases and Materials on Labor Law 133 (5th ed.

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[18] The federal labor legislation of which we speak is the Wagner Act (49 Stat. 449), as amended by the Taft-Hartley Act (P.L. No. 101, 80th Cong., 1st Sess., 1947) and the Landrum-Griffin Act (Labor-Management Reporting and Disclosure Act, P.L. No. 257, 86th Cong., 1st Sess., 1959); these enactments are codified in 29 U.S.C. §§ 141-87. The Landrum-Griffin Act amended the statute in respects not material to this case.

1962). See also *NLRB* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937).[19]

The Taft-Hartley Act in 1947 did not change this underlying premise. It did treat certain coercive union tactics, such as violence and intimidation, secondary boycotts, strikes to compel an employer to commit an unfair labor practice, and jurisdictional strikes over work assignments,[20] but as recognized by *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970) and all the commentators, Congress remained careful not to legislate terms and conditions of employment nor to vest power in the NLRB to determine such items. The theory continues to be that the framework of labor-management relations was guaranteed by law, but the hammering-out of matters within that framework was left solely to the participants.

An item within this framework which is of considerable importance to employees is the matter of work

[19] This Court has recognized the basic thrust of the labor Acts in numerous cases. One of the most recent is *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), where the Court stated:

> The object of this [the Wagner] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to insure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement (*Id.* at 103-04).

[20] See A. Cox & D. Bok, *supra*, at 142-48.

assignments. See generally, Note, *Automation and Collective Bargaining,* 84 Harv. L.Rev. 1822 (1971). An employee who has spent years learning the skills of a particular job can have his job security threatened by a work assignment. When modernization of technology combines the skills of two different tasks into a single task, the employer must decide which employee will do the modernized work. An unfavorable important work assignment probably means eventual unemployment for the disfavored employee or group of employees, as the case may be. Similarly, where a part of the work done by a skilled employee can arguably be accomplished by a lesser-skilled employee at a lower rate of pay, an employer for financial reasons may want to shift the work away from the skilled employee. This clearly means greater unemployment for this type of worker. Surely no one would deny that the interest of the employees in work assignments is both substantial and legitimate.[21] Favorable wage rates and working hours are of no value when an employee is out of work.

Congress was persuaded in enacting the Taft-Hartley Act that work assignments were too important to foreclose employees from taking the employer to task over this issue, as they do over wages, hours and other working conditions. Employees can try negotiation, conciliation or strike. The Taft-Hartley Act considered only a particular aspect of work assignment controversies: the inter-union dispute.

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[21] The issue is no less important here than in *Fibreboard Paper Products Corp.* v. *East Bay Union of Machinists, Local 1304,* 379 U.S. 203 (1964). The concern of employees in that case was the shifting of work away from them to the employees of another employer. It is of equal concern when the shift is to other employees of one's own employer.

The problem to which President Truman referred was the inter-union aspect of a broader employer-union controversy over work assignments. Employers were repeatedly caught in a cross-fire between two unions over the matter of work assignments. Where an employer faced a work assignment choice between employees represented by different unions,[22] he might be placed in the position where he could do no right. Whether or not he had a preference between the employee groups, the employer had no open options; an assignment to one union necessarily left him at odds

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[22] Petitioner NLRB hints (Brief at 19; also see Laborers Brief at 31) that one of the unions in the inter-union dispute may be a "stranger" to the employer. It is not clear what the NLRB would make of this argument. Since it appears that the NLRB is referring to situations in the building and construction industry, we think the response has been well put by the Harvard Law Review:

> In a subcontracting situation, the general contractor should be considered the assigning employer of all the work done by all employees on a project, including the employees hired by subcontractors. It can be assumed that the general contractor will contract out particular work with an awareness of the association which exists between various subcontractors and certain employee groups and, therefore, can be considered as assigning the work to these employees. Furthermore, since the employees of the subcontractor are all working on the same project and performing work for the general contractor, it does not seem that the interposition of a subcontractor between the general contractor and the employees should affect the applicability of § 8(b)(4)(D). That there are special relationships, calling for special treatment, between contractors, subcontractors, and employees in the building and construction industry has been recognized by Congress in amendments to the Taft-Hartley Act excepting this industry from the general prohibitions against hot-cargo clauses. Note, *Work-Assignment Disputes Under the National Labor Relations Act*, 73 Harv. L. Rev. 1150, 1153-54 n.24 (1960).

with the other union. In the absence of the inter-union aspect, the employer could resolve the work assignment question like any other labor-management controversy—by negotiation or a test of economic strength.

Many references are found in the Congressional debate of inter-union rivalries which put the employer in the position of being hopelessly unable to satisfy his employees.[23] Congress set out to protect the employer from being caught between two warring unions. The problem in drafting the Taft-Hartley Act was how to protect the employer from the inter-union crossfire and still preserve the employees' admittedly legitimate interest in the work assignment controversy. There was a danger of throwing out the baby with the bath-water. A blanket prohibition of strikes would do exactly that. With the strike potential removed, it would have the effect of affirming all employer work assignments and extinguishing the interests of the employee in all work assignment situations.

Another possibility was to vest power in the NLRB to make a binding determination which would settle not only the inter-union dispute but would make a work assignment decision binding upon both unions

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[23] See, *e.g.*, II Leg. Hist. 951 (Senator Morse); II Leg. Hist. 983 (Senator Morse); II Leg. Hist. 1056-57 (Senators Ellender and Morse); II Leg. Hist. 1157 (Senator Smith); "A jurisdictional dispute is one growing out of a dispute between two or more representatives of employees," I Leg. Hist. 583 (Rep. Landis). The House Report on H.R. 3020 states:

> Jurisdictional strikes usually involve quarrels, not between employers and employees, but between rival unions, which use the strike weapon against each other . . . . I Leg. Hist. 292, 315.

and the employer as well. But this option is contrary to Congressional policy of leaving the substantive terms of employment to be exclusively settled by labor-management interaction.

Senator Morse's approach recognized that the employer has a twofold interest in the work assignment controversy. He may have a preference between the two groups of employees, and he also has an interest in being free of the inter-union aspect of the jurisdictional strike. Senator Morse's § 10(k) protects only the latter interest, not the work assignment preference. The only effect of § 10(k) is to take the losing union out of the picture by making it an unfair labor practice for that union to strike. The winning union is not guaranteed the work assignment and thus the policy of government non-interference in substantive terms is preserved. The winning union must still bring its negotiating skill and economic pressure to bear on the employer. Of course, then, in this scheme the employer has no necessary place in the forum where the inter-union aspect of the controversy is settled.

Since Congress declared a limited policy of extracting this inter-union aspect,[24] any procedural rule which interrupts the settlement procedure, or expands the protection, is improper. The NLRB's strained re-

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[24] Indeed, the NLRB admits that the only interest protected by Congress was the freedom from the inter-union aspect of the work assignment controversy. Where the NLRB finds that an inter-union dispute is not a factor, it quashes notice of the § 10(k) hearing. See *Local 1905, Carpet, Linoleum & Soft Tile Layers (Butcher & Sweeney Const. Co.)*, 143 NLRB 251 (1963); *Wood, Wire and Metal Lathers, Local 328 (Acoustics and Specialities, Inc.)*, 139 NLRB 598 (1962); *Teamsters Local 107 (Safeway Stores, Inc.)* 134 NLRB 1320 (1961).

quirement is that unless the employer agrees to the private mode of settlement, the private settlement is not worth a whit. This does more than interrupt the Congressionally-recognized private settlement—it frustrates it entirely at the whim of the employer.

Of course, as Judge Leventhal pointed out (A. 371), the significant clue to an understanding of § 10(k) is the fact that the employer is not bound by the NLRB's § 10(k) determination. If Congress had bound the employer, it would mean that Congress was not only extracting the inter-union aspect of the work assignment controversy, but was also deciding the work assignment question itself. Congress had both of these options open to it, but left the ultimate resolution of the work assignment to the employer and one union. Since the sole purpose of the legislation is to extract the inter-union aspect, there is every reason to allow the unions to do it of their own volition, and it is contrary to the purpose of the Act for the NLRB to preclude them by refusing to recognize the voluntary adjustment of the dispute if the employer has not participated.

This destruction of private settlement procedures in favor of administrative action cuts squarely against the thrust of recent Supreme Court decisions. See, *Boys Markets, Inc.* v. *Retail Clerks Local 770,* 398 U.S. 235 (1970); *Carey* v. *Westinghouse Electric Corp.,* 375 U.S. 261 (1964); Note, *Labor Law—Work Assignment Disputes—Efficacy of Private Arbitral Remedy Without Employer Participation,* 17 Wayne L. Rev. 189, 198 (1971). Yet the NLRB's proffered rationale for giving the employer this unfettered option is that the employer's interest in the resolution of the work assignment must be protected. This is a totally unwar-

ranted expansion of Congressional protection.[25] If Congress had thought otherwise, it would have bound both unions[26] and the employer to the § 10(k) determination and been done with the whole business.

In the words of Justice Frankfurter in a similar context, the NLRB cannot by construction find a broad policy against all jurisdictional strikes "when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law." *Carpenters Local 1976* v. *NLRB*, 357 U.S. 93, 100 (1958).

III. NEITHER PETITIONERS' RATIONALE NOR PROFFERED POLICY CONSIDERATIONS HAVE MERIT

This Court unanimously held in *CBS* that Congress has set the policy considerations in § 10(k) and that they may not be undercut by the NLRB. Strictly

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[25] There are innumerable examples of substantial employer economic interests in internal union affairs which Congress has not afforded protection. An employer dealing regularly with a particular local union may be terribly interested in which of two candidates will be elected business agent of the local, but the employer is not allowed to participate.

[26] The NLRB (Brief at 23n.15) appears to suggest that "theoretically" the § 10(k) determination is not even binding on the losing union because of a different standard of proof in the § 8(b)(4)(D) proceeding. If this is the intention, it is not true. Once the § 10(k) determination is made, it is controlling in the § 8(b)(4)(D) hearing; the only question remaining is whether the union has struck or threatened to. See *Carpenters Local 753 (Blount Bros. Corp.)*, 179 NLRB No. 95 (1969); *Local 4, Longshoremen (Aluminum Co. of America)*, 163 NLRB 1039, 1042 (1967); *New York Newspaper Printing Pressmen, Local 2 (New York Times Co.)*, 154 NLRB 1122, 1124 (1965); *Local 3, IBEW (Western Electric Co.)*, 144 NLRB 1318 (1963). The § 10(k) determination absolutely prohibits the losing union from striking over the issue. The employer is left to do whatever he pleases.

speaking, then, the underlying policy considerations of § 10(k) need not be discussed, but that risks suspicion that policy cannot be handled. The NLRB and its supporters emphasize policy, but Judge Leventhal's holding comports far better with the policies of § 10 (k) and so we gladly take up the issue.

A. NLRB Obedience to Consistency Highlights Its Error

As we pointed out in Part I, the starting point of any statutory construction case is the language of the statute.[27] Yet neither the NLRB's nor Texas State Tile's brief begins with a discussion of the language—nor with the legislative history or policy of the Act. Rather, their principal point is that the NLRB has consistently adhered to its interpretation of "parties to such dispute" in § 10(k) since Taft-Hartley was enacted.[28] Far from being persuasive evidence that the NLRB's construction is correct, this unwavering adherence invites skepticism, since the NLRB's practice was developed, without reasoned analysis, as an ancillary issue in a now discredited line of cases. Indeed, the doctrine has flourished without any regard for this Court's repudiation in *CBS*[29] of the NLRB's fundamental understanding of § 10(k).

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[27] "Most relevant, of course, is the very language in which Congress has expressed its policy and from which the Court must extract the meaning most appropriate." *Carpenters Local 1976* v. *NLRB*, 357 U.S. 93, 100 (1958).

[28] A like argument was unsuccessfully advanced in *CBS*, 364 U.S. at 585.

[29] In *CBS* the Court pointed to inconsistency between the Board's regulations and its decisions. The practice here is inconsistent in statutory approach with another line of Board authority beginning with *Safeway Stores* discussed at n.7, *supra*. Also, as the court below pointed out, when Congress amended the Taft-Hartley Act in certain particulars in 1959, it did not address itself to §§ 8(b)(4)(D) or 10(k). (A. 379)

In none of the cases cited by the NLRB,[30] Texas State Tile [31] or the dissenting opinion below [32] as evidencing NLRB practice, did the NLRB give reasoned explanation for its interpretation of "parties to such dispute". These cases all trace back to *Los Angeles Bldg. & Constr. Trades Council (Westinghouse Electric Corp.)*, 83 NLRB 477, 482 n.7 (1949).[33] After *Westinghouse,* all NLRB cases dispose of the issue by simply declaring it to be controlled by NLRB precedent.[34]

The discussion in *Westinghouse* reads in full:

> As Westinghouse was not a party to any AFL awards of jurisdiction, we find no merit to the Trades Council's contention that such awards in its favor are determinative in this case. 83 NLRB at 482 n.7.

This is hardly the type of reasoned statutory analysis by an administrative agency which is entitled to judicial respect.

What is even more extraordinary than the absence in the NLRB decisions of any analysis is that the NLRB should have failed to examine its present rule

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[30] NLRB Brief at 15 n.6.

[31] Texas State Tile Brief at 16-17.

[32] A. 387 n.1.

[33] Cited only in the Texas State Tile Brief. *Westinghouse* is the earliest case cited by Petitioners, except for the two inapposite decisions cited at the end of n.6 on page 15 of the NLRB brief which were overruled by *CBS*.

[34] Thus, for example, the first case cited by the NLRB (Brief at 15 n.6) is *Local 231, Hod Carriers (Middle States Telephone Co.)*, 91 NLRB 598, 604 (1950). This case simply cites *Westinghouse Electric, supra.*

after *CBS* corrected the NLRB's fundamental misunderstanding of § 10(k). After all, the precedents carry their own death wound. They flow from an approach to the statute which has already been discredited: The single footnote in *Westinghouse,* which is the origin of the entire body of administrative practice, follows text stating and applying the very rule of law at issue in and reversed by *CBS*. Respect for the opinions of this Court should have counseled reexamination by the NLRB of its practice in light of the authoritative analysis of the statutory provisions which it purports to apply.[35] In short, the NLRB asks this Court to give greater weight to the NLRB's administrative practices than the NLRB has been willing to give the decisions of this Court.

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[35] The Petitioner claims (NLRB Brief at 16; Texas State Tile Brief at 17) that the NLRB's interpretation in issue here "has tacitly been accepted" by and "favorably relied upon" by courts of appeals. Judge Leventhal more accurately noted, "the precise question before us is, in any meaningful sense, one of first impression in the federal courts" (A. 372). A review of those cases supports Judge Leventhal's view: In *NLRB* v. *Local 825, Operating Engineers,* 410 F.2d 5 (3rd Cir. 1969), rev'd on other grounds, — U.S. —, 27 L. Ed. 2d 398 (1971), the unions *and* the employer were stipulated to the Joint Board. In *New Orleans Typographical Union, Local 17* v. *NLRB,* 368 F.2d 755 (5th Cir. 1966), there was no agreement between the unions for a voluntary adjustment of their dispute. The court in *NLRB* v. *Local 825, Operating Engineers,* 326 F.2d 213 (3rd Cir. 1964), found that only one of the *unions* involved in the dispute had agreed to the voluntary adjustment of the dispute. Finally, *Local 450, Operating Engineers* v. *Elliott,* 256 F.2d 630 (5th Cir. 1958) was an appeal from a § 10(1) injunction where the court did not have to reach this issue. *Quinn* v. *NLRB,* 61 LRRM 2690 (D.C. Cir. 1966) is not on point. See Judge Leventhal's discussion, A. 383-84).

B. The NLRB Is Intruding on the Domain of Congress

Certainly in some situations the employer has an economic interest in the resolution of the work assignment.[36] But Congress did not let the employer "have it both ways," as the NLRB would permit. If the employer wishes to have the work assignment settled once and for all he can join with the two unions in a *binding* voluntary settlement procedure. He does not do so by going to the NLRB, where he isn't bound. As Judge Leventhal stated, "[a]n employer properly has standing under these provisions when he is plagued by employee groups that do not agree, and not when he is dissatisfied with the way they do agree." (A. 383).

Most significantly, the NLRB[37] is forced to fall back on the following argument to sustain its position:

> [I]t is highly unlikely that Congress designed a structure for settling these disputes *that would bind the employer to a settlement* to which he was not a party and in which he had no voice. Indeed, the notion that a party with a direct interest in a controversy (*particularly one whose outcome will require specific action by him*) is entitled to be heard in the settlement of that controversy is basic to our concept of fair procedure . . . . (NLRB Brief at 19-20) (emphasis added).

The NLRB's position on the § 10(k) language and the policy of the Act depends on this view, and it is wrong. When the employer is not bound to the inter-union settlement, its outcome requires no "specific action" by him. If the inter-union settlement does not accord

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[36] *See also* Laborers' Brief at 19-20.

[37] *See also* Laborers' Brief at 19-20.

with his preference on the work assignment, he has no obligation in law or fact to implement its result.

Texas State Tile's[38] similar reliance suffers from the same infirmity. *Transportation-Communications Employees* v. *Union Pac. R.R. Co.*, 385 U.S. 157 (1966)[39] is important for the contrast of legislative scheme involved there with the one at issue in this case. Under the Railway Labor Act, the Railroad Adjustment Board is assigned the task of making a substantive grievance determination in a compulsory arbitration between employer and union. The decision is binding on the employer, and the procedure specifically includes him. By contrast, no compulsory binding decision on the employer is made under the Taft-Hartley Act. The distinction in purpose between the two Acts explains why the requirements are, and must be, different.

Petitioners[40] are thus forced to the heart of their position, which is that practically speaking the em-

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[38] Texas State Tile Brief at 32-36.

[39] Texas State Tile misconceives the California cases cited in its brief at 33. There employers and unions arbitrated the effect of contracts on a second employers who were not bound to the arbitrations. The California court did not hold that the arbitrations violated due process, it held that the results of the arbitrations could not be enforced in a court of law against the second employers. In the situation under § 10(k), the employer has no legally enforceable obligation placed against him by the inter-union procedure when he has not stipulated to be bound. He can resist the union which prevails in the inter-union settlement, and no § 301 contract liability accrues against him. If the California cases are taken as overturning the arbitration itself on due process grounds, then the cases have been implicitly overruled by *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964).

[40] NLRB Brief at 23; Texas State Tile Brief at 33.

ployer is bound by the § 10(k) determination for if he disagrees with it, he will be at the mercy of the striking union. This fundamental premise of the NLRB is wholly unwarranted. It is the province of Congress, not the NLRB, to determine whether the unions enjoy such economic power that employers must have this sort of protection. Congress was not so persuaded in 1947, and the NLRB may not amend the statute by administrative fiat. This case "affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what Congress has enacted." *Carpenters Local 1976* v. *NLRB supra*, 357 U.S. at 100.

C. The NLRB's Doctrine Disrupts Industrial Peace and Stability

As *CBS* recognizes, the purpose of § 10(k) is to encourage unions to settle jurisdictional disputes between themselves short of enmeshing the employer; thus the section "offers strong inducements to quarrelling unions to settle their differences . . ." 364 U.S. at 577. The NLRB doctrine in this case cuts the other way. Unions are persuaded not to settle voluntarily, since their employer can unilaterally void the settlement by demanding a second hearing, this time before the NLRB.

The employer is induced by the NLRB *not* to enter into the voluntary settlement procedure. As long as he refuses to participate and be bound by the inter-union settlement procedure, the employer substantially increases the ultimate chances that the work assignment will go his way. The union receiving the employer's initial assignment of the work will

always argue the employer's side of the case in the voluntary settlement proceeding. Assuming the employer stands a 50% chance of having his work assignment affirmed in the voluntary settlement proceeding[41] and another 50% chance before the NLRB, he increases his overall chances to 75% by refusing to join in the private settlement.

In fact, the employer is offered a far greater inducement. The NLRB's dismal record of fairness in making § 10(k) determinations suggests the degree to which the NLRB has refused to comply with *CBS*. From the *CBS* decision in 1961 through December 31, 1970, the NLRB made 349 § 10(k) determinations. It affirmed the employer's assignment in 95.1% of the § 10(k) cases. Of these cases, 171 involved construction industry disputes. The NLRB there affirmed 96.5% of the employers' assignments.[42] Judge Leventhal posits that this routine affirmance of employers' assignments results from the fact that the employer is not bound to accept the § 10(k) determination (A. 380-81).

Commentators[43] have also concluded that the NLRB has not changed its pre-*CBS* policy. The American

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[41] The employer may have less than a 50% chance in the voluntary settlement because if his initial assignment was demonstrably correct, the union would never have raised the issue. This also explains the figures of the National Joint Board in affirming employer assignments (the figures are quoted in the appendix to the Laborers' Brief). Since that Plan is of long standing, most employers make assignments according to the established rules.

[42] Figures obtained from the Office of the General Counsel, NLRB.

[43] *See* Atleson, *The NLRB and Jurisdictional Disputes: The Aftermath of CBS*, 53 Geo. L.J. 93, 117-21, 133-34, 150-51 (1964); Cohen, *The NLRB and Section 10(k): A Study of the Reluctant Dragon*, 14 Lab. L.J. 905, 917 (1963); Hickey, *Government Regulations of Inter-Union Work-Assignment Disputes*, 16 S.C. L.Rev.

Bar Association's Special "Committee on the Building and Construction Industry" after making a review of the cases and statistics, reached the same conclusion as other commentators that "the Board has ignored or juggled the factors before it in a given case, often inconsistently, to reach an apparently preconceived result." Report, A.B.A. Section of Labor Relations Law, Report of the Special Committee on the Building and Construction Industry 452, 455 (1965). With such a record, the NLRB should not suggest[44] unions and employers would flock to private settlement forums if only those forums were as equitable as the NLRB.

This inducement is all the more unfortunate because the voluntary means of settlement are far superior to the NLRB's § 10(k) procedure. The private settlement is the only way of bringing about a permanent resolution of the dispute because the § 10(k) determination never binds the employer.[45] Judge Leventhal

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333, 387 (1964); Note, *Jurisdictional Disputes Since the CBS Decision*, 39 N.Y.U. L.Rev. 657, 681-85 (1964). *See also* Feldacker, *Subcontracting Restrictions and the Scope of Sections 8(b)(4)(A) and (B) and 8(e) of the National Labor Relations Act*, 17 Lab. L.J. 170, 176 n.28 (1966).

[44] NLRB Brief at 29-30.

[45] Some unions, described as "imperialistic" (K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION: THE CAUSES, THE JOINT BOARD, AND THE NLRB, 39-40 (1961) attempt to expand their jurisdiction at the expense of other unions. When they are parties to an inter-union settlement procedure such as the Joint Board, conflicts inevitably arise between their expansion goals and their contractual commitments to their sister unions. The latter problem is neatly sidestepped by assistance, unwitting or otherwise, from the employer who refuses to become bound to the Joint Board and insists on a § 10(k) determination. Having obtained the initial assignment from the employer (many times by pressure), the imperialistic union (despite a contrary Joint Board award) will prevail in the § 10(k) case before the NLRB (in about 96% of the

pointed out, "[t]he Act does not authorize the Board to compel the employer to change his assignment, or a union to renounce an assignment that the employer is willing to give." (A. 382). Another important consideration is the flexibility that private means of settlement enjoy, which is not shared by the NLRB procedure. When problems arise relating to procedures, awards, or enforcement under a private mode of settlement, the procedures can be quickly changed to accommodate the needs of an industry. Even if it were not for the built-in inflexibility of established administrative procedures, § 10(k) gives the NLRB very little leeway at all. Furthermore, the NLRB's inordinate delay in processing § 10(k) cases shows the inherent difficulty of the administrative procedure. Last year it took the NLRB a median average of 230 days to issue a § 10(k) determination.[46]

As Judge Leventhal also stated (A. 382), the most important attribute of the private settlement is its enforceability short of a work stoppage. The winning union in a voluntary settlement procedure may bring

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cases) over the union which traditionally performed the work, and can blame the whole affair on the NLRB.

Presumably all agreements for private inter-union settlements will and do have similar obligations on the participants. As Judge Leventhal put it, "The impetus for unions to live up to the inter-union agreement rests on reinforcing considerations of honor, reciprocity, mutuality—and enforceability." (A. 382). Congress did not intend § 10(k) to be a tool used by expansion-minded unions to foster jurisdictional disputes. But this is precisely what the NLRB has allowed. In the guise of protecting employer "interests" the NLRB has unwittingly permitted employers to be caught up in a whirlpool of a union's jurisdictional goals.

[46] These figures for fiscal 1970 were obtained from the Executive Secretary's Office of the NLRB.

an action under Section 301 of the Taft-Hartley Act[47] or in a state court "to secure injunctive relief against a union that has failed to abide by its agreement to honor [a voluntary settlement] decision and renounce the work." (A. 382). Even in the interim period while the arbitration award is being enforced, the public interest is safeguarded by a § 10(l) injunction (A. 382). There is no good reason for this procedure[48] to

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[47] There is no problem presented by Texas State Tile's contention (Brief at 31) that if the employer goes along with the inter-union settlement one of the unions can turn on him by filing a § 301 contract damage action. Since the union filing the suit will have participated in the settlement, any court will quickly turn a deaf ear when the union makes a reversal of position vis-a-vis the employer. Any number of legal theories are available, perhaps the most obvious being mutual amendment of the collective bargaining agreement.

Equally without merit are the Laborers' similar arguments. The argument that private settlements will force violations of § 8(a)(3) and § 8(b)(2) (Laborers Brief at 31-32) was made against NLRB determinations in *CBS* and was rejected. 364 U.S. at 584. Since then the NLRB has had no difficulty managing the sections of the act simultaneously. See *Local 502, Hod Carriers (Cement-Work, Inc.)*, 140 NLRB 694 (1963). Congress expressly authorized the private settlement; it could hardly be saying it would violate the Act to employ it. The Laborers' argument proves too much. The Laborers' suggestion (Brief at 30-31) that a union losing the voluntary settlement procedure will be caught between enforcement of the voluntary settlement and a § 301 or § 303 suit by the employer is similarly weak. Numerous collective bargaining clauses will prevent this problem from occurring. Further, the union in this situation is in a problem of its own making; it entered into a commitment to its fellow union and a possibly conflicting collective bargaining agreement with the employer with "eyes open." *See Local 636, Plumbers* v. *NLRB*, 430 F.2d 906, 908 (D.C. Cir. 1970).

[48] The NLRB (Brief at 24-25) complains that a private mode of settlement may not consider all the relevant factors in reaching its determination. Although we seriously question whether the NLRB considers all relevant factors, the argument nonetheless

be frustrated by the NLRB when the NLRB's alternative does not work nearly so well.

Also, this Court has found a second important policy at stake in the enactment of § 10(k); in *CBS* this Court stated:

> For, in the vast majority of cases, such a narrow determination would leave the broader problem of work assignments in the hands of the employer, exactly where it was before enactment of § 10 (k)—with the same old basic jurisdictional dispute likely to vex him, and the rival unions, *short of striking,* would still be free to adopt *other forms of pressure upon the employer.* 364 U.S. at 579-80 (emphasis added).

The NLRB's rule in this case is inconsistent with this policy; it leaves the employer with a union which is determined to harass the employer over the work

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fails for another reason. If Congress had directed the NLRB to make a decision as to who would get the work which was binding on the employer, the factors in making the decision would be of considerable importance from a public interest standpoint. Congress did not set out these factors because, in fact, the NLRB is making no such determination. The NLRB under § 10(k), just as the unions in a voluntary proceeding where the employer is not stipulated, decides only the inter-union aspect of the controversy. There is no binding determination of a work assignment. This is left to be resolved between the employer and the union.

Texas State Tile argues (Brief at 27-28) that a "public interest" supports a determination of the work assignment which will consider "all sides of the controversy", thus making the employer a necessary party. We would agree with this *if* the Congress had set out to decide the work assignment, but it did not. It only extracted the inter-union aspect, leaving even the § 10(k) participating employer unbound. The only final settlement of the actual work assignment comes about through private settlements to which the employer voluntarily binds himself. The NLRB doctrine at issue in this case induces the employer not to do so.

assignment at every opportunity. When the union's victory in the private settlement is snatched away by the NLRB, it is doubtful the union will passively defer to the NLRB relitigation; it will probably, as this Court recognized, "adopt other forms of pressure upon the employer." 364 U.S. at 579-80. Where the NLRB relitigates, industrial strife continues unabated.

At pages 35-36 of its Brief, Texas State Tile[49] says:

> Finally, the Board's construction of Section 10 (k) to require the employer's assent to any voluntary adjustment is consonant with the underlying basis of all the body of arbitration law that has developed as a vital part of national labor policy, *i.e.*, that arbitration is consensual.

On the contrary, this policy militates strongly against the NLRB's construction. The proposition "arbitration is consensual" is not simply part of the "body of arbitration law," it is a part of the basic philosophy of the Act that employees and unions should be free to settle disputes between themselves which affect wages, hours and working conditions. See pp. 20-28, *supra*. The Congressional policy against compulsory arbitration is nowhere more clearly articulated than in Senator Taft's famous speech explaining that the avoidance of compulsory arbitration See II Leg. Hist. 1005, 1007. *Street, Elec. Ry. & Motor Coach Employees, Div. 998* v. *Wisconsin Employment Relations Board,* 340 U.S. 383, 395 n.21 (1951). Yet §10(k) is a form of compulsory arbitration—it is the forced settlement of a dispute by NLRB hearing or private settlement. The central issue here, as in *CBS,* is which dispute Congress chose to submit to com-

[49] The Laborers make the same argument. (Brief at 16-19).

pulsory arbitration under § 10(k): that between two unions over the right to claim work, or that between employer and union over the propriety of an assignment. Once it is acknowledged, as the Petitioners must, that compulsory arbitration of *employer-union* disputes was an anathema to Congress, affirmance of the decision below becomes inevitable.

CONCLUSION

For the reasons stated above, the judgment of the court below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1971

No. 70-63

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, *et al.*

No. 70-65

TEXAS STATE TILE & TERRAZZO COMPANY, INC., *et al.*,
Petitioners,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the position of Plasterers' Local Union No. 79, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42(2) of the Rules of this Court.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 121 national and international unions whose jurisdictions cover the full gamut of this country's industrial life. These unions have a total membership of approximately 13,500,000 working men and women and the Federation is thus the majority spokesman for all facets of the labor movement.

Section 10(k) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*, allows the parties to a jurisdictional dispute 10 days after a § 8(b)(4)(D) unfair labor practice charge is filed to "agree upon methods for the voluntary adjustment of the dispute" and directs the Board to quash the notice that it will hear and determine the dispute when such an agreement is consummated. The Board rule in question here, the practical effect of which is to grant employers the right to compel a § 10(k) hearing in every case, deprives unions of the right to utilize this permission to the fullest.

The proper construction of the abstention provision of § 10(k) is of vital interest to every one of the Federation's affiliates. Each working man's livelihood depends on the extent to which available work is allocated to the particular trade, class, or craft in which he is included. Thus the question of which group shall have the right to claim certain types of work is a matter of general and recurring significance. For this reason jurisdictional disputes may and do arise in every industry. They are not confined to the building and construction context in which the instant case arose. Indeed, the two leading decisions of this Court relevant here both arose in far different settings, *NLRB* v. *Radio &*

Television Broadcast Engineers (CBS), 364 U.S. 573 (broadcasting); *Carey* v. *Westinghouse,* 375 U.S. 261 (electrical manufacturing).

The disputes regulated by §§ 8(b)(4)(D) & 10(k) normally implicate questions of trade union jurisdiction. Such questions which have their root in the terms of the competing organizations' constitutions, and of their charters from the Federation, are peculiarly suited to internal solution by organized labor. And, as recognized in *CBS,* 364 U.S. at 580, the union movement has, in fact, continuously attempted to settle jurisdictional disputes through its own procedures. See also e.g. Taft, The AFL In The Time Of Gompers, pp. 185-212 (1957); Taft, The AFL From The Death of Gompers To The Merger, pp. 461-472 (1959). In many instances these efforts have borne fruit. In others they have failed, primarily because the adverse effects of a particular decision on the losing organization were so great that it chose not to comply in the absence of effective legal sanctions.

Congress was well aware of these efforts in 1947. And the debates on Taft-Hartley make it plain that §§8(b)(4)(D) & 10(k) were intended to be responsive to the view that it is "beneficial" that jurisdictional disputes be resolved "within [labor's] own ranks, where they properly should be settled," 93 Cong. Rec. 4035 (Senator Murray). The abstention provision of § 10(k) is the means Congress chose to protect the labor movement's opportunity for internal resolution of such disputes. By its plain terms it gives the competing employee groups (the parties to the jurisdictional dispute) a last chance to resolve the matter by them-

selves prior to the invocation of compulsory arbitration, the sanction Congress mandated to "[stimulate] labor organizations to set up appropriate [internal settlement] machinery." *Ibid.* The Board's rule that employers can force a § 10(k) hearing at will destroys this opportunity for inter-union settlement which Congress was careful to preserve. It is because of this profoundly destructive effect that the AFL-CIO wishes to take this opportunity to acquaint the Court with its views.

ARGUMENT

1. "The language of § 10(k) [of the National Labor Relations Act], supplementing § 8(b)(4)(D) as it does, sets up a method adopted by Congress to try to get jurisdictional disputes settled." *NLRB* v. *Radio & Television Broadcast Engineers Union (CBS)*, 364 U.S. 573, 579. As a last resort that method provides for a Board decision as to "which of two or more employee groups claiming the right to perform certain work tasks is right." *Id.* at 586. To reduce the occasion for such Board determinations § 10(k) also provides that "the parties to the dispute out of which the [§ 8(b)(4)(D)] unfair labor practice shall have arisen" shall have 10 days after the filing of a charge alleging a jurisdictional strike, or the threat of such a strike, to either adjust, "or agree upon methods for the voluntary adjustment of, the dispute"; and that "upon such voluntary adjustment of the dispute" the § 8(b)(4)(D) charge shall be dismissed.

The question presented here, as stated by the Board, is whether the abstention provision of § 10(k) is applicable "where the competing unions have agreed upon a voluntary method of adjustment but the employer involved has not

consented to be bound by that procedure." Bd. Br. p. 2. The court below (2-1, Judges Leventhal and McGowan in the majority, Judge MacKinnon dissenting) answered this question in the affirmative in a comprehensive and fully reasoned opinion based on the "guidance and . . . instruction" of this Court's leading *CBS* opinion (A. 374) and a "fresh examination of the relevant legislative history" (A. 375). The Board would have it answered in the negative on the basis of a doctrine, first stated in a three-line *ipse dixit* (see *Los Angeles Building Trades Council (Westinghouse Corp.)*, 83 NLRB 477, 482 n. 7) and never subsequently explicated, which drew its essence from the overall view of §§ 8(b)(4)(D) & 10(k) discredited in *CBS*, and which the Board has failed to reexamine in light of that decision, which "should have alerted the Board to modify its interpretation" (A. 378). And in the instant case, as in *CBS*, it is the lower court, rather than the Board, which has correctly discerned Congress's plan for regulating jurisdictional disputes—as we now demonstrate.

2. As this Court has explicitly recognized, labor-management controversies precipitated by an employer's decision to use one group of employees rather than another "to do the same work under similar conditions of employment" (*Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 213, 218), fall within the class of basic economic issues that the NLRA directs shall be settled by free "collective bargaining with the right to strike at its core" (*Bus Employees* v. *Missouri*, 374 U.S. 74, 82). For such decisions, whether they take the form of subcontracting the work to another employer, transferring the work from one bargaining unit to another, or hiring one group of specialized workers rather than another, lie outside the "core of entrepreneurial con-

trol" (*Fibreboard*, 379 U.S. at 233, Stewart J., concurring) and constitute a direct threat to "the maintenance of the basic wage structure" of the affected group (*Local 24 Teamsters* v. *Oliver*, 358 U.S. 283, 294). Work assignment questions may, however, create not one disagreement but two: the basic employer-employee controversy as to who shall *do* the work, and an ancillary dispute between competing groups of employees as to which group shall have the right to *claim* the work. When a conjunction of the two occurs, a stable settlement of the employer-employee controversy through the normal means of private resolution contemplated by the Act is all but impossible. For there is no way for the employer to satisfy two or more employee groups, each of which wants the same work, and each of which has the right to use economic force. See *CBS*, 364 U.S. at 582.

This threat to the smooth and equitable functioning of the labor relations system is open to two basic legislative solutions. First, to perfect the process for the private ordering of employer-employee work assignment controversies by a legal rule which insures that no more than one of the competing employee groups shall have the right to contest a work assignment. The focus of such a reform is the regulation of "disputes between two or more groups of employees" (*CBS*, 364 U.S. at 579) with the end in view of protecting "employers caught in the crossfire between the disputing unions" (A. 375). Second, to reject the private dispute settlement process in this area as unworkable and to replace it, in those instances in which the employees attempt to use self-help to protect their interests, with binding compulsory arbitration determinations as to who shall do the work in question. The aim of this reform is

to insure that work assignments shall be made by the employer, or a third party, free of employee economic pressure rather than by a process in which "the use of economic pressure" is accepted as "part and parcel of the system" (*NLRB* v. *Insurance Agents International*, 361 U.S. 477, 489).

If Congress had adopted the second of these alternatives, it would, to use the Board's words, have "designed a structure for settling [work assignment] disputes that would bind the employer to a settlement . . . and require specific action by him," and as the Board concludes, it would be "highly unlikely" that such a regime would recognize a settlement to which the employer "was not a party and in which he had no voice." Bd. Br. pp. 19-20. Instead of taking that course in enacting §§ 8(b)(4)(D) & 10(k), however, Congress chose the first alternative noted above. And in view of that choice Judge Leventhal necessarily concluded that employer "resistance 'could [not] be the sole factor making inoperative' the 'voluntary adjustment' abstention provision of § 10(k)" (A. 379), for the congressional plan only grants "[a]n employer . . . standing . . . when he is plagued by employee groups that do not agree, and not when he is dissatisfied with the way they do agree" (A. 383).

3. It is now beyond question that the purpose of §§ 8(b)(4)(D) & 10(k) is to "get jurisdictional disputes settled." *CBS*, 364 U.S. at 579. The structure and language of § 10(k), the legislative history, and the overall structure and theory of the Act all demonstrate, as this Court squarely held in *CBS*, that the dispute the Board is empowered to resolve is the "dispute between two or more groups of em-

ployees over which is entitled to do certain work for an employer" (364 U.S. at 579).

The structure of §§ 8(b)(4)(D) & 10(k) makes it perfectly plain that the Board has not been granted the authority to settle work assignment controversies between employers and employees, for employers are not bound by the Board's dispute determination. If the employer adheres to his assignment notwithstanding the Board's decision, he does not commit an unfair labor practice and he cannot, therefore, be subjected to public sanctions. Correlatively, the employee group which prevails in a § 10(k) hearing does not secure the right to do the work in question. It secures only the right to claim that work and to support its demand with economic force without committing the unfair labor practice defined in § 8(b)(4)(D). Finally, the losing employee groups before the Board are not forbidden to perform the work if their employer chooses to give it to them. What they lose is the right to demand that work through the use of economic force. In short, the sole function of §§ 8(b)(4)(D) & 10(k) is to prevent strikes growing out of an unresolved dispute between competing employee groups, and to ensure that once that dispute is settled only one of the groups will be able to strike or picket an employer; thereby facilitating the normal process of private labor-management decision-making by safeguarding the employer against being "caught in a crossfire between disputing unions" (A. 375).

The relevant statutory language likewise compels the conclusion that the Board's power is limited to the settlement of inter-union disputes. The final sentence of § 10(k) states: "Upon compliance by the parties to the dispute with the decision of the Board or upon . . . voluntary ad-

justment of the dispute, [the § 8(b)(4)(D)] charge shall be dismissed." Since, as pointed out above, § 8(b)(4)(D) imposes no legal obligations upon employers, the concept of *employer* compliance is meaningless. The clear implication of the foregoing is thus that the dispute is one between the competing employee groups—the parties that are legally obliged to comply with a Board determination. Moreover, the Act directs the Board "to hear and determine the dispute out of which [the § 8(b)(4)(D)] unfair labor practice shall have arisen." The activity condemned by § 8(b)(4)(D) is the strike growing out of unresolved competing employee claims. And the foregoing language indicates that there is a distinction between such strikes and the "dispute" which the Board is directed to determine. The fact that such a distinction is recognized leads to the conclusion that the Board is to settle the "jurisdictional dispute," i.e., the dispute between the competing employee groups, and that it is not, as it suggests, empowered to determine "the dispute over the jurisdictional strike to which the employer is obviously a party" (Bd. Br. p. 26). Indeed that dispute is settled automatically by the issuance of a § 10(l) injunction. A. 372-374.

The definition of the term "dispute" in *CBS* was adopted after a full consideration of the legislative history. See 364 U.S. at 581-582. And the additional material set out by the lower court after its "fresh examination" (A. 375) of that history serves only to reinforce the validity of this Court's reading of the Act. For it is the inevitable result of a fair consideration of the relevant materials; the authoritative explanations of the purpose of the jurisdictional dispute provisions, at every step of their evolution, allow for no

other construction. The Board has been able to adhere to the opposite result only because it has never confronted the legislative history.

In calling for legislation on this subject President Truman characterized the problem as a "form of union disagreement . . . involving the question of which labor union is entitled to perform a particular task." 93 Cong. Rec. 136. The House Report on §§ 2(15) & 12(a)(3)(A) of H.R. 3020, 80th Cong., 1st Sess., which provisions closely tracked § 8(b)(4)(D) standing alone and before § 10(k) was added to it, states that jurisdictional strikes "do not arise out of any dispute between an employer and employees" and that they "usually involve quarrels . . . between rival unions, which use the strike weapon against each other." House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 23-24. And the court below noted:

> "Senator Morse, who proposed the forerunner provision which emerged, with relatively minor modification, as § 10(k), prepared a 'definitional' memorandum, which stated that while there are various kinds of 'jurisdictional disputes' they 'have as their common ingredient a controversy between two or more labor unions.' " A. 375-376.

Finally, the House Conference Report, which was prepared after Taft-Hartley had reached its final form, stated:

> "This section [10(k)] would empower and direct the Board to hear and determine disputes between unions giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes)." House Conf. Rept. No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 57.

Of equal importance, we have been unable to find, and the briefs of the petitioners and the *amici* supporting their position do not cite, any legislative materials that would

support the conclusion that a proponent of §§ 8(b)(4)(D) & 10(k) squarely proposed, or even that Congress squarely considered, the proposition that the Board should have the power to settle work assignment controversies between employers and employees through the system of compulsory arbitration mandated by § 10(k). As noted in point 2 above, those controversies implicate a basic economic issue which directly affects the employees' vital interests, and which lies outside the "core of entrepreneurial control." "[P]rivate bargaining [concerning such issues] under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract" is the "fundamental premise on which the Act is based." *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108. Indeed, the Congress that enacted §§ 8(b)(4)(D) & 10(k) into law was so jealous of that fundamental premise that it also added § 8(d) to the Act "to prevent the Board from controlling the settling of the terms of collective bargaining agreements." *Insurance Agents*, 361 U.S. at 487; see also *NLRB* v. *American Ins. Co.*, 343 U.S. 395, 404. And the essence of the generative principle which guided Congress was set out by Senator Taft in the following terms:

> "Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract . . .
>
> "We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages,

> prices, and working conditions. But if we impose compulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy." 93 Cong. Rec. 3835.

In short, "[c]ollective bargaining, with the right to strike at its core, is the essence of the federal scheme." *Bus Employees* v. *Missouri,* 374 U.S. at 82. Thus, the conclusion that §§ 8(b)(4)(D) & 10(k) are not to be interpreted as granting the Board, rather than employers and employees, the power to settle work assignment controversies, is compelled. To paraphrase Mr. Justice Harlan's concurring opinion in *National Woodwork Mfrs. Assoc.* v. *NLRB,* 386 U.S. 612, 649-650:

> "In view of Congress' deep commitment to the resolution of matters of vital importance to management and labor through the collective bargaining process, and its recognition of [economic action] as a legitimate weapon in that process, it would be unfortunate were this Court to attribute to Congress, on the basis of . . . an opaque legislative record, a purpose to outlaw . . . [all] collective bargaining and [strike] conduct [aimed at settling employer-employee work assignment controversies] . . . [T]his Court should not take such a step until Congress has made unmistakably clear that it wishes wholly to exclude collective bargaining as one avenue of approach to solutions in this elusive aspect of our economy."

4. Judge Leventhal reasoned that:

> "Since a jurisdictional dispute for purposes of § 10(k) is a 'dispute between two or more groups of employees,' it follows that these employee groups are 'the parties to such dispute' for purposes of determining whether

there exists a voluntary adjustment procedure within the abstention provision of 10(k)." A. 374.

This definition of the term "parties" follows ineluctably from three separate lines of analysis.

First, as Judge Learned Hand stated, normally "[l]egal interpretation involves an imaginative projection upon the occasion that has arisen of what would have been the choice of the lawmakers . . . [The judge] is called upon to ascribe to others a decision that they never actually forecast by fabricating fictitious appraisals," quoted in Lesnick, *The Gravamen of the Secondary Boycott*, 62 Col. L. Rev. 1363, 1393-1394 n. 155. Here no such "imaginative projection" is necessary. Senator Morse, the sponsor of § 10(k), provided an exact description of the model upon which that Section was based, and in the course of his discussion of the incident which stimulated the plan he proposed, and which became the law, he explicitly stated that the provision allowing the parties a period of time after a strike growing out of a jurisdictional dispute first erupts to resolve the matter was designed to "give union leaders [an opportunity] to settle" their differences:

> "I noticed, as a member of the War Labor Board during the war, that there was tremendous opposition to our exercising jurisdiction over certain types of work stoppages, such as the jurisdictional dispute, which we knew could not be justified on any basis by those participating in the dispute. I remember very clearly a night when we had a very serious stoppage of work in one of the vital war plants of the country because of a jurisdictional dispute. I then proposed that unless the workers went back to work at the next shift the Board should appoint an arbitrator whose decision

should be final and binding. Labor vigorously opposed my position.

"In that particular case the Board took a recess, and in 10 minutes one of the labor representatives came back and stated that the men had been ordered back to work by the union. That is the way they preferred it. That is the way I prefer it, too. But we could not take a chance. Therefore, I offered a resolution, which became the policy of the Board, with labor dissenting at the time it was adopted, which provided that for the duration of the life of the War Labor Board we would give the union leaders involved in a jurisdictional dispute 24 hours to proceed to settle the dispute without a work stoppage, and upon their failure to do so we would appoint an arbitrator whose decision would be final and binding.

"What I wish to stress is the remarkable compliance we obtained so far as the quick settlement of jurisdictional disputes was concerned, once the resolution became the policy and procedure of the Board.

"I think it ought to be frankly stated here this afternoon that probably one of the greatest benefits that will come from the adoption of such amendments to the Wagner Act as I am proposing this afternoon will be action on the part of the unions themselves to see to it that it does not become necessary, unless in exceptional cases, to resort to the machinery which I have proposed in these amendments. I am not being fooled in regard to this question. The point I wish to emphasize is that I believe that declaring certain actions to be unfair labor practices will be preventive of some of the abuses which we seek to cure, because the unions themselves will proceed to establish within their own organizations machinery capable of settling such disputes short of economic action." 93 Cong. Rec. 1844-1845.

The foregoing makes it manifest: first, that where there is a strike, or the threat of a strike, growing out of a jurisdictional dispute, which is the pre-condition for the applicability of §§ 8(b)(4)(D) & 10(k), the resulting work stoppage must be halted, and, as the lower court pointed out, that is the function of § 10(l) (A. 372-374); second, the strike having been halted, the "union leaders involved" are to be given a period of time "to proceed to settle the dispute"; third, "upon their failure to do so . . . an arbitrator [i.e., the Board] whose decision would be final and binding" is to settle the inter-union dispute; and fourth, once that dispute is settled the employer and the employees are to be remitted to the normal private processes for the resolution of their disagreements. As the lower court observed, in light of this explanation by the provision's sponsor, "there can be no doubt that the parties to the jurisdictional dispute were conceived of as the rival unions, or employee groups" (A. 377).

Second, Judge Leventhal concluded that Congress intended to protect the employer interest in "neutrality," i.e., in being free of "the crossfire between the disputing unions and unable to satisfy either" (A. 375). The doctrine that the employer is a necessary party to a voluntary method of adjustment grants him the right to choose the forum in which the inter-union dispute shall be decided and not simply the right to be heard. Indeed in the instant case the employer refused to participate in an arbitral proceeding that was open to him. A. 370 n. 10. The limited employer interest in "neutrality" is an insufficient basis upon which to rest a veto power having such profound implications. For "[t]he purpose of protecting the neutral em-

ployer is fully served by *any* binding settlement between the disputing employee groups." A. 375 (emphasis added).

There can be no doubt that the lower court's definition of the employer interest the Act was intended to protect captures the congressional understanding. This Court, drawing on the legislative history of § 8(b)(4) in its entirety has concluded that all of the subsections of that provision are "limited to protecting employers in the position of neutrals between contending parties." *National Woodwork,* 386 U.S. at 625. Consistent with that insight, the theme of the debates on §§ 8(b)(4)(D) & 10(k) follows the note struck in House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 23, which characterized the employers caught in jurisdictional disputes as "the helpless victims of quarrels that do not concern them at all." See e.g. the remarks of Representative Landis: "Innocent employers should not be penalized because unions force a strike to settle difficulties between unions" (93 Cong. Rec. A-1222); Senator Ellender: "[D]isputes often arise between unions as to the division of [steel erection] work. In cases of that kind both owner and contractor are helpless . . . [I]n the brewery industry there still persists the fight between brewery workers and teamsters . . . the brewery owners are helpless" (93 Cong. Rec. 4132); Senator Murray: "[J]urisdictional disputes inflict incalculable harm upon the fair-dealing, law-abiding union employer" (93 Cong. Rec. 4905); and Senator Ball: "[E]mployers often are the innocent victims, the secondary victims, so to speak, of such practices" (93 Cong. Rec. 5015).

In contrast, the congressional debates contain no support for the proposition, advanced by the Board (Bd. Br. 18-20),

that §§ 8(b)(4)(D) & 10(k) are based on the premise that employers have a "vital [economic] interest" in the *manner* in which competing employee groups settle their jurisdictional disputes. So far as we are aware the debates do not contain a single criticism of the terms of an inter-union resolution of a dispute. Senator Murray's statement that it is "beneficial" that such disputes be resolved "within [labor's] own ranks, where they properly should be settled" (93 Cong. Rec. 4035) reflects a broad consensus. Indeed, the primary criticism of the labor movement was that the number of settlements it had achieved was insufficient. Thus Representative Hartley concluded his discussion of a jurisdictional dispute between the Carpenters and Laborers in New Jersey by noting:

> "Both carpenters and laborers are satisfied to get back to work. But why is it they cannot? It is because Mr. Hutcheson, the head of the carpenters, and Mr. Moreschi, the head of the laborers here in Washington, have refused to get together and settle this jurisdictional dispute. They could do it overnight if they had the will to." 93 Cong. Rec. 3425.

And Senator Morse took that criticism into account in shaping § 10(k). For he noted that "one of the greatest benefits" of his proposal would be that "the unions themselves" when faced with the threat of a Board determination "will proceed to establish within their own organizations machinery capable of settling such disputes short of economic action." 93 Cong. Rec. 1845.

Thus the argument that § 10(k) was intended to insure employers a voice in settling inter-union disputes fails for the want of a proper predicate in the legislative history.

For, as Judge Hand noted, in the last sentence of the statement quoted in part on p. 13 *supra*, the proper role of the courts when interpreting statutory language is to "reconstitute the gamut of values current at the time when the words were uttered" (62 Col. L. Rev. at 1394 n. 155).

Finally, as noted in point 3 above, employers are not bound by the Board's dispute determinations. The statutory scheme preserves their right to protect their economic interests through self-help, and the employer who adheres to his original assignment does not commit an unfair labor practice. This being so, the basic concepts of equity counsel against a construction of the Act which allows employers to require resort to Board dispute determinations, thereby thwarting the desire of the competing employee groups to settle the matter through a voluntary method of adjustment. As the court below stated:

> "Our understanding of the thrust of Federal labor policy as developed by Congress proceeds along lines congruous to those developed by the Supreme Court in *Boys Markets, Inc.* v. *Retail Clerks*, [398 U.S. 235]. There the Court reversed a ruling of but nine years standing in order to maintain the efficacy of the arbitration remedy—viewed in the large as furthered by an injunction preserving the status quo pending the arbitral process. The Court stressed the importance of mutuality—that an employer could not be held to his contract to pursue the arbitration remedy if he could not obtain effective relief (including pendente lite injunction) to enforce the union's similar obligation. Our situation is marked by technical differences but similarity in principles. As we have noted, Board abstention under § 10(k) in favor of an arbitration agreement is accompanied by injunctive relief to main-

tain the status quo pending the conducting of the arbitration and the enforcement of the award. And the pattern we find in the Act avoids a lack of mutuality since the employer cannot interfere with arbitration on the ground that he desires to permit the Board to conduct a proceeding and issue an order that he is not obligated to observe." A. 386.

5. In the final analysis, the Board's position here rests on the proposition that 23 years of undisturbed adherence to a rule of law creates a proscriptive right to error. This is a variant of the Board's position in *CBS* that 12 years was sufficient to make the Board's construction of §§ 8(b)(4)(D) & 10(k) "a part of the statute." See 364 U.S. at 585. It is not surprising that the Board should be driven to the same last resort in both cases, for the doctrine at issue in *CBS*, and the doctrine in question here, are two interrelated corollaries of the Board's original approach to those provisions.

It was early recognized that the secondary boycott provision, § 8(b)(4)(B), "could not be literally construed; otherwise, it would ban most strikes historically considered to be lawful . . ." *Local 761 IUE* v. *NLRB (General Electric)*, 366 U.S. 667, 672. In construing the jurisdictional dispute provisions, however, the Board proceeded without due consideration for the limitations imposed by § 13 (compare *National Woodwork*, 386 U.S. at 643), or the basic proposition that "it is the entire Act, and not merely one portion of it, which embodies 'the definitive statement of national policy.'" *Local 1424 Machinists* v. *NLRB (Bryan Mfg. Co.)*, 326 U.S. 411, 418 n. 7. Focusing on the bare words of § 8(b)(4)(D), to the exclusion of the added insights into Congress' intent to be gleaned from § 10(k) and the

legislative history, the Board concluded that the Act protected the employer interest in making "work assignments without being subject to strike pressure to compel a different assignment" unless his action was inconsistent with a pre-existing legal obligation imposed by a Board certification or an agreement to which he was a party. See *Local 173 Lathers (Newark and Essex Plastering)*, 121 NLRB 1094, 1107-1109; *Local 16 ILWU (Juneau Spruce)*, 82 NLRB 650, 655-656.

This approach affected the formation of the § 10(k) law in two ways. First, as the Court recognized in *CBS*, it led to the Board's conclusion that a decision that the striking union "was not entitled to have the work assigned to its members because it had no right to it under either an outstanding Board order or certification . . . or a collective bargaining agreement" required an affirmance of the employer's assignment. See 364 U.S. at 577-578, 582-583. Second, it led to the doctrine at issue here, that arbitral determinations to which the employer was not a party were without force and effect in a § 10(k) proceeding. That doctrine was first announced as a substantive rule derived from the decisions in *Juneau Spruce* and *Marine Cooks (Irwin Lyons Co.)*, 82 NLRB 916, in a case in which the union raised the award as a defense on the merits and did not seek to have the § 10(k) notice of hearing quashed on the basis of the abstention provision. The Board simply stated: "As Westinghouse was not a party to any AFL awards of jurisdiction, we find no merit to the Trades Council's contention that such awards in its favor are determinative in this case." *Los Angeles Building Trades Council*, 83 NLRB at 482 n. 7. And as the Employer's brief

candidly admits, from that point on the Board has simply "couched its determination in statutory terms" and after fulfilling that formality has ruled that the abstention provision did not apply where the employer was not a party to the private settlement. Texas Tile Co. Br. pp. 15-16. Thus the Board's rule was evolved, and has been followed, without any attempt by the agency to face up to, much less do business with, the language and structure of § 10(k) or that provision's legislative history.

In a closely related context the Board has squarely recognized that this Court's opinion in *CBS:*

> "... not only rejected the type of determination made in that case and in the instant case but rejected also the Board's underlying view of the scope and interplay of Sections 8(b)(4)(D) and 10(k). Thus, although the facts in the instant case, as heretofore found, might be deemed to fall within the *literal* terms of the Section 8(b)(4)(D) proscription, the Supreme Court noted in *CBS* that Section 8(b)(4)(D) does not stand alone but is supplemented by Section 10(k). The two provisions must be read together. So read, the provisions apply, as the Supreme Court noted, to disputes between 'two or more employee groups claiming the right to perform certain work tasks . . .' 364 U.S. 573 at 586.
>
> "The thrust of the *CBS* decision was, to be sure, directed at the Board's misconception of the kind of determination required by Section 10(k). But, in terms, the Supreme Court said it was 'the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision.' 364 U.S. 573, at 585. Implicit in this directive is the proposition that Sec-

> tions 8(b)(4)(D) and 10(k) were designed to resolve competing claims between rival groups of employees, and not to arbitrate disputes between a union and an employer where no such competing claims are involved." *Local 107 Teamsters (Safeway Stores)*, 134 NLRB 1320, 1322.

On this basis the Board reversed its conclusion, arrived at prior to *CBS*, that §§ 8(b)(4)(D) & 10(k) reach strikes which do not grow out of "disputes between rival groups of employees." *Ibid.* Pursuant to its *Safeway* doctrine the Board has held that a disclaimer of the work in question by one of the competing employee groups constitutes a voluntary adjustment which requires Board abstention. See e.g., *Local 1905 Painters (Butcher & Sweeney)*, 143 NLRB 251; compare A. 383-384. Section 10(k) accords equal dignity to such adjustments and to agreements for the voluntary adjustment of the dispute. For a commitment by a union to submit to binding arbitration is an undertaking to renounce the right to claim the work in the event of an adverse decision. It follows that in this case, as in *Safeway*, if the principles of *CBS* are applied rather than ignored, inter-union action to resolve a dispute must be deemed sufficient to satisfy the abstention provision.

CONCLUSION

For the reasons set out above, as well as those stated by Plasterers' Local Union No. 79, the decision below should be affirmed.

Respectfully submitted,

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August, 1971

NATIONAL LABOR RELATIONS BOARD *v.* PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSN., AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 70–63. Argued October 13, 1971—Decided December 6, 1971*

Two unions, the Plasterers and the Tile Setters, in accordance with procedures binding them to arbitrate, submitted to a board their jurisdictional dispute over work to be done for a contractor. The board awarded the work to the Plasterers. When the contractor and the Tile Setters refused to abide by the arbitration board's decision, the Plasterers, to force reassignment of the work, picketed that contractor as well as another contractor employing members of the Tile Setters. Neither contractor was subject to the arbitration agreement. Charges were thereupon filed against the Plasterers for allegedly violating § 8 (b) (4) (D) of the National Labor Relations Act, and a hearing to resolve the dispute was held under § 10 (k), which directs the National Labor Relations Board (NLRB) to "hear and determine the dispute out of which [the alleged] unfair labor practice has arisen" unless "the parties to such dispute" agree upon a settlement. The NLRB, after weighing the arbitration board's decision "and all [other] relevant factors," awarded the work to the Tile Setters. When the Plasterers refused to abide by the award, a § 8 (b) (4) (D) complaint was filed against them and they were found to have violated that provision. Both contractors, which had collective-bargaining agreements with the Tile Setters (but not with the Plasterers) and had been employing members of that union to perform the operation involved in the jurisdictional dispute, contended that it was far more efficient for them to use tile setters than plasterers. The Court of Appeals on review set aside the NLRB's order, holding that it is not the employer but the rival unions who are parties to the jurisdictional dispute to which § 10 (k) applies. *Held:*

*Together with No. 70–65, *Texas State Tile & Terrazzo Co., Inc., et al.* v. *Plasterers' Local Union No. 79, Operative Plasterers' & Cement Masons' International Assn., AFL–CIO, et al.*, also on certiorari to the same court.

Syllabus

The employers here, both of which had substantial financial stakes in the outcome of the § 10(k) proceeding, were "parties to the dispute" within the meaning of that provision and the NLRB was empowered to determine the jurisdictional dispute under that provision in this case where the competing unions, but not the employers, had agreed upon a voluntary method of adjustment. *Highway Truckdrivers, Local 107 (Safeway Stores, Inc.)*, 134 N. L. R. B. 1320, distinguished. Pp. 123–137.

142 U. S. App. D. C. 146, 440 F. 2d 174, reversed.

WHITE, J., delivered the opinion for a unanimous Court.

Norton J. Come argued the cause for petitioner in No. 70–63. With him on the brief were *Solicitor General Griswold, Richard B. Stone, Arnold Ordman, Dominick L. Manoli*, and *Marvin Roth*. *Wayne S. Bishop* argued the cause and filed a brief for petitioners in No. 70–65.

Donald J. Capuano argued the cause for respondents. With him on the brief were *Martin F. O'Donoghue* and *Patrick C. O'Donoghue*.

Laurence Gold argued the cause for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance. On the brief was *Thomas E. Harris*.

Briefs of *amici curiae* urging reversal were filed by *Joseph M. Stone, George L. Plumb*, and *Betty Southard Murphy* for Associated General Contractors of America et al.; by *Robert J. Connerton, Arthur M. Schiller*, and *Jules Bernstein* for the Laborers' International Union of North America, AFL–CIO; and by *Albert E. Jenner, Jr.*, and *Chester T. Kamin* for the Scientific Apparatus Makers Assn.

Louis Sherman and *Elihu I. Leifer* filed a brief for the Building and Construction Trades Department, AFL–CIO, as *amicus curiae* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

When a charge is filed under § 8 (b)(4)(D), the provision of the Labor Management Relations Act [1] banning so-called jurisdictional disputes, the Board must under § 10 (k) "hear and determine the dispute out of which [the] unfair labor practice shall have arisen, unless . . . the parties to such dispute" adjust or agree upon a method for the voluntary adjustment of the dispute.[2]

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[1] 61 Stat. 136, 29 U. S. C. § 141 *et seq.*

[2] Section 8 (b)(4) provides that it shall be an unfair labor practice for a labor organization or its agents "(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." 29 U. S. C. § 158 (b)(4).

Section 10 (k) provides:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158 (b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed." 29 U. S. C. § 160 (k).

The issue here is whether an employer, picketed to force reassignment of work, is a "party" to the "dispute" for purposes of § 10 (k). When the two unions involved, but not the employer, have agreed upon a method of settlement, must the Board dismiss the § 10 (k) proceedings or must it proceed to determine the dispute with the employer being afforded a chance to participate?

I

Texas State Tile & Terrazzo Company (Texas State) and Martini Tile & Terrazzo Company (Martini) are contractors in Houston, Texas, engaged in the business of installing tile and terrazzo. Both have collective-bargaining agreements with Tile, Terrazzo and Marble Setters Local Union No. 20 (Tile Setters) and have characteristically used members of the Tile Setters union for laying tile and also for work described in the collective-bargaining contract as applying "a coat or coats of mortar, prepared to proper tolerance to receive tile on floors, walls and ceiling regardless of whether the mortar coat is wet or dry at the time the tile is applied to it." [3]

This case arose when Plasterers' Local Union No. 79, Operative Plasterers' and Cement Masons' International Association of Houston, Texas (Plasterers), picketed the job sites of Texas State and Martini claiming that the work of applying the mortar to receive tile was the work of the Plasterers' union and not of the Tile Setters.[4] Neither Texas State nor Martini had a collective-bargaining contract with the Plasterers or regularly employed workers represented by that union.

Before the Texas State picketing began, the Plasterers submitted their claim to the disputed work to the National Joint Board for Settlement of Jurisdictional Dis-

[3] App. 20.

[4] This dispute grew out of a new method of applying tile which was developed in the mid-1950's. R. 111, 123, 135.

putes (Joint Board), a body established by the Building Trades Department, AFL–CIO, and by certain employer groups.[5] Both the Plasterers' and the Tile Setters' locals were bound by Joint Board decisions because their international unions were members of the AFL–CIO's Building Trades Department. Neither Texas State nor Martini had agreed to be bound by Joint Board procedures and decisions, however. The Joint Board found the work in dispute to be covered by an agreement of August 1917, between the two international unions, and awarded the work to the Plasterers.[6] When Texas State and the Tile

[5] The National Joint Board for the Settlement of Jurisdictional Disputes is an arbitration panel established by a 1948 agreement between the Building and Construction Trades Department, AFL–CIO, and the Associated General Contractors of America and several specialty contractors' associations. The Joint Board consists of an equal number of representatives of employers and unions and a neutral chairman. An employer may become a party to a Joint Board proceeding by signing a stipulation agreeing to be bound by the results of the proceeding. Art. III, § 7, AFL–CIO, Bldg. & Constr. Trades Dept., Plan for Settling Jurisdictional Disputes Nationally and Locally 10 (1970). Member unions of the AFL–CIO's Building Trades Department do not have to agree formally to abide by Joint Board decisions, because they are bound by virtue of provisions contained in their constitutions. AFL–CIO, Bldg. & Constr. Trades Dept., Procedural Rules and Regulations of the National Joint Board 2 (1970). See generally K. Strand, Jurisdictional Disputes in Construction: The Causes, the Joint Board, and the NLRB 89–104 (1961). In the cases here, both the Tile Setters and the Plasterers were members of the Building Trades Department.

[6] In the Texas State case, the Joint Board on November 9, 1966, awarded all of the disputed work to the Plasterers except "any coat to be applied wet the same day under tile." App. 316. The Tile Setters refused to give up the work of laying the plaster undercoat to which the dry mortar was applied, claiming that the Joint Board decision gave this work to them. The Plasterers established a picket line on January 24, 1967; on March 15, 1967, the Joint Board issued a clarification of its decision, stating that the final smooth plaster coat was to be done by the Plasterers unless it was laid the same day as the tile and dry-set mortar were applied, in which case it was to be done by the Tile Setters. App. 341.

Setters refused to acquiesce in the Joint Board decision and change the work assignment, the Plasterers began the picketing of Texas State which formed the basis for the § 8 (b)(4)(D) charges.[7] The Plasterers also picketed a job site where Martini employees, members of the Tile Setters, were installing tile, although this dispute had not been submitted to the Joint Board.

Martini and Southwestern Construction Company, the general contractor that had hired Texas State, filed § 8 (b)(4)(D) unfair labor practice charges against the Plasterers, and the NLRB's Regional Director noticed a consolidated § 10 (k) hearing to determine the dispute.[7] Southwestern, Texas State, Martini, and the two unions participated in the hearing. A panel of the Board noted that the Tile Setters admitted being bound by Joint Board procedures, but deemed the Joint Board decision to lack controlling weight,[8] and "after taking into account and balancing all relevant factors" awarded the work to the Tile Setters.[9] When the Plasterers refused

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[7] The employer-subcontractor, Texas State, intervened as a party.

[8] App. 22.

[9] The NLRB considered the collective-bargaining agreements among the parties, industry and area practice, relative skills and efficiency of operation, past practices of the employers, agreements between the Plasterers and the Tile Setters, the Joint Board award (the NLRB refused to give this controlling weight because of its "ambiguous nature," App. 22), and concluded:

"Tile setters are at least as skilled in the performance of the work as plasterers, and both Texas Tile and Martini, which assigned them to the work, have been satisfied with both the quality of their work and the cost of employing them. Moreover, the instant assignments of the disputed work to tile setters are consistent with the explicit provisions of the collective-bargaining agreement between the Tile Setters and Texas Tile and Martini, are consistent with the past practice of the Employers, and are not inconsistent with area or industry practice. . . ." App. 23. The Board's decision in the § 10 (k) proceeding is reported at 167 N. L. R. B. 185 (1967) and its decision and order in the unfair labor practice proceeding are reported at 172 N. L. R. B. Nos. 70, 72 (1968).

to indicate that they would abide by the Board's award, a § 8 (b) (4) (D) complaint was issued against them, and they were found to have committed an unfair labor practice by picketing to force Texas State and Martini to assign the disputed work to them.[10] In making both the § 10 (k) and § 8 (b) (4) (D) decisions, the Board rejected the Plasterers' contention that even though the employer had not agreed to be bound by the Joint Board decision, the provisions of § 10 (k) precluded a subsequent Board decision because the competing unions had agreed upon a voluntary method of adjustment.

On petition to review by the Plasterers and cross petition to enforce by the Board, a divided panel of the Court of Appeals set aside the order of the Board.[11] It held that: "It is not the employer but the rival unions (or other employee groups) who are the parties to the jurisdictional dispute contesting which employees are entitled

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[10] The § 10 (k) determination is not binding as such even on the striking union. If that union continues to picket despite an adverse § 10 (k) decision, the Board must prove the union guilty of a § 8 (b) (4) (D) violation before a cease-and-desist order can issue. The findings and conclusions in a § 10 (k) proceeding are not *res judicata* on the unfair labor practice issue in the later § 8 (b) (4) (D) determination. *International Typographical Union*, 125 N. L. R. B. 759, 761 (1959). Both parties may put in new evidence at the § 8 (b) (4) (D) stage, although often, as in the present cases, the parties agree to stipulate the record of the § 10 (k) hearing as a basis for the Board's determination of the unfair labor practice. Finally, to exercise its powers under § 10 (k), the Board need only find that there is reasonable cause to believe that a § 8 (b) (4) (D) violation has occurred, while in the § 8 (b) (4) (D) proceeding itself the Board must find by a preponderance of the evidence that the picketing union has violated § 8 (b) (4) (D). *International Typographical Union*, 125 N. L. R. B. 759, 761 n. 5 (1959).

[11] *Plasterers' Local Union No. 79* v. *NLRB*, 142 U. S. App. D. C. 146, 440 F. 2d 174 (1970).

to seek the work in question." [12] It concluded that the Board may not make a § 10 (k) determination of a jurisdictional dispute where the opposing unions have agreed to settle their differences through binding arbitration. Both the Board and the employers petitioned for certiorari, and we granted the petitions.[13]

II

Section 8 (b)(4)(D) makes it an unfair labor practice for a labor organization to strike or threaten or coerce an employer or other person in order to force or require an employer to assign particular work to one group of employees rather than to another, unless the employer is refusing to honor a representation order of the Board. On its face, the section would appear to cover any union challenge to an employer work assignment where the prohibited means are employed. *NLRB* v. *Radio & Television Broadcast Engineers Union, Local 1212 (CBS)*, 364 U. S. 573, 576 (1961). As the charging or intervening party, the employer would normally be a party to any proceedings under that section.[14] Section 8 (b)(4)(D), however, must be read in light of § 10 (k) with which it is interlocked. *NLRB* v. *Radio & Television Broadcast Engineers, supra,* at 576. When a § 8 (b)(4)(D) charge is filed and there is reasonable cause to believe that an unfair labor practice has been

[12] *Id.*, at 152, 440 F. 2d, at 180. Although the dispute at the Martini work site had not been submitted to the Joint Board, the Court of Appeals nevertheless held that, because the two unions had agreed to be bound by the procedures and decisions of the Joint Board, the NLRB was precluded from hearing and determining the Martini dispute under § 10 (k).

[13] 401 U. S. 973 (1971).

[14] See 29 CFR §§ 102.8, 102.9, 102.109 (1971); *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL–CIO, Local 283* v. *Scofield*, 382 U. S. 205, 219–221 (1965).

committed, issuance of the complaint is withheld until the provisions of § 10 (k) have been satisfied. That section directs the Board to "hear and determine" the dispute out of which the alleged unfair labor practice arose; the Board is required to decide which union or group of employees is entitled to the disputed work in accordance with acceptable, Board-developed standards, unless the parties to the underlying dispute settle the case or agree upon a method for settlement. Whether the § 8 (b)(4)(D) charge will be sustained or dismissed is thus dependent on the outcome of the § 10 (k) proceeding. The Board allows an employer to fully participate in a § 10 (k) proceeding as a party. If the employer prefers the employees to whom he has assigned the work, his right to later relief against the other union's picketing is conditioned upon his ability to convince the Board in the § 10 (k) proceeding that his original assignment is valid under the criteria employed by the Board.

The alleged unfair labor practice in this case was the picketing of the job sites by the Plasterers, and the dispute giving rise to this picketing was the disagreement over whether Plasterers or Tile Setters were to lay the final plaster coat. This dispute was a three-cornered one. The Plasterers made demands on both Texas State and the Tile Setters and on both Martini and the Tile Setters. In both cases, the employers' refusal to accede to the Plasterers' demands inevitably and inextricably involved them with the Tile Setters against the Plasterers. It was this triangular dispute which the § 10 (k) proceeding was intended to resolve.

It may be that in some cases employers have no stake in how a jurisdictional dispute is settled and are interested only in prompt settlement. Other employers, as shown by this case, are not neutral and have substantial economic interests in the outcome of the § 10 (k) proceeding. A change in work assignment may result in different

terms or conditions of employment, a new union to bargain with, higher wages or costs, and lower efficiency or quality of work. In the construction industry, in particular, where employers frequently calculate bids on very narrow margins, small cost differences are likely to be extremely important.[15] In the present case, both employers had collective-bargaining contracts with the Tile Setters specifically covering the work at issue; neither had contracts with the Plasterers nor employed Plasterers regularly. Both employers determined it to be in their best interests to participate vigorously in the Board's § 10 (k) proceeding. The employers contended it was more efficient and less costly to use the same craft for applying the last coat of plaster, putting on the bonding coat, and laying the tile and that it was more consistent with industry practice to use the Tile Setters as they did.[16] Both companies claimed that their costs would be substantially increased if the award went to the Plasterers, and that without collective-bargaining contracts with the Plasterers, they would lose 30%–40% of their work to plastering contractors.[17] It is obvious, therefore, that both Texas State and Martini had substantial stakes in the outcome of the § 10 (k) proceeding.

The phrase "parties to the dispute" giving rise to the picketing must be given its common-sense meaning corresponding to the actual interests involved here. Cf. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL–CIO, Local 283* v. *Scofield*, 382 U. S. 205, 220 (1965). Section 10 (k) does not expressly or impliedly deny party status to an employer, and since the section's adoption in 1947,

[15] See Comment, The Employer as a Necessary Party to Voluntary Settlement of Work Assignment Disputes Under Section 10 (k) of the NLRA, 38 U. Chi. L. Rev. 389, 400 (1971).

[16] R. 96–97, 130–132, 141.

[17] R. 95, 129, 145–148.

the Board has regularly accorded party status to the employer and has refused to dismiss the proceeding when the unions, but not the employer, have agreed to settle.[18]

The Court of Appeals rejected this construction of § 10 (k). Its reasoning, which we find unpersuasive, was that because the employer is not bound by the § 10 (k) decision, he should have no right to insist upon participation. But the § 10 (k) decision standing alone, binds no one. No cease-and-desist order against either union or employer results from such a proceeding; the impact of the § 10 (k) decision is felt in the § 8 (b)(4)(D) hear-

[18] See, *e. g.*, *Lodge 68 of the Int'l Assn. of Machinists* (*Moore Drydock Co.*), 81 N. L. R. B. 1108, 1113–1114, 1126–1128 (1949); *Local 231, Int'l Hod Carriers* (*Middle States Telephone Co.*), 91 N. L. R. B. 598, 604 (1950); *United Brotherhood of Carpenters, Local 581* (*Ora Collard*), 98 N. L. R. B. 346, 348–349 (1952); *United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada*, 108 N. L. R. B. 186, 197 (1954); *Bay Counties District Council of Carpenters*, 115 N. L. R. B. 1757, 1766–1767 (1956); *Local 173, Wood, Wire, & Metal Lathers' Int'l Union* (*Newark & Essex Plastering Co.*), 121 N. L. R. B. 1094, 1103–1104 (1958); *Int'l Union of Operating Engineers* (*Schwerman Co. of Pa., Inc.*), 139 N. L. R. B. 1426, 1429 (1962); *Carpenters District Council of Denver* (*J. O. Veteto & Son*), 146 N. L. R. B. 1242, 1245 (1964); *Electrical Workers, Local 26* (*McCloskey & Co.*), 147 N. L. R. B. 1498, 1501–1503 (1964); *Operative Plasterers Int'l Assn.* (*Twin City Tile & Marble Co.*), 152 N. L. R. B. 1609, 1611, 1615 (1965); *Int'l Union of Operating Engineers, Local 49* (*Egan-McKay Electrical Contractors, Inc.*), 164 N. L. R. B. 672, 673 (1967). The Board has reasserted this view since the Court of Appeals' decision in the instant case, *Lathers Local 104* (*Blaine Petty Co.*), 186 N. L. R. B. No. 70 (1970). Until now, courts of appeals have uniformly upheld the Board's position; see, *e. g.*, *New Orleans Typographical Union No. 17* v. *NLRB*, 368 F. 2d 755, 763 (CA5 1966), *NLRB* v. *Local 825, Int'l Union of Operating Engineers*, 326 F. 2d 213, 216 (CA3 1964); *Local 450, Int'l Union of Operating Engineers* v. *Elliott*, 256 F. 2d 630, 636 (CA5 1958). See also *Carey* v. *Westinghouse Electric Corp.*, 375 U. S. 261, 264 (1964), citing *Wood, Wire & Metal Lathers Int'l Union* (*Acoustical Contractors Assn.*), 119 N. L. R. B. 1345, 1347 (1958).

ing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding. If the picketing union persists in its conduct despite a § 10 (k) decision against it, a § 8 (b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the § 10 (k) decision and the employer does not comply, the employer's § 8 (b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed.[19] Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the § 10 (k) decision, but both will lose their § 8 (b)(4)(D) protection against the picketing which may, as it did here, shut down the job. The employer will be under intense pressure, practically, to conform to the Board's decision. This is the design of the Act; Congress provided no other way to implement the Board's § 10 (k) decision.

We do not find that the legislative history of § 8 (b)(4)(D) and § 10 (k) requires a different conclusion. The Court of Appeals and the Plasterers rely upon various statements in the legislative history of the two sections, particularly the remarks of Senator Morse, referring to

[19] This dismissal will not be pursuant to the language of § 10 (k) directing dismissal upon "compliance by the parties . . . with the [Board's] decision" but, rather, under § 8 (b)(4)(D) because the "employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." Apparently, the Board construes this language to include disregarding a § 10 (k) decision. Brief for the NLRB 23 n. 16, 28 n. 21. The Board's regulations now provide that "if the Board determination is that employees represented by a charged union are entitled to perform the work in dispute, the regional director shall dismiss the charge as to that union irrespective of whether the employer has complied with that determination." 36 Fed. Reg. 9133 (1971).

jurisdictional disputes as controversies between two labor unions,[20] and a passage in the House Conference Report referring to § 10 (k) as directing the Board to "hear and determine disputes between unions giving rise to unfair labor practices under section 8 (b)(4)(D)." [21] Nothing in these remarks or in the other relevant legislative documents indicates an affirmative intent to exclude an interested employer from participating in a § 10 (k) proceeding. The usual focus of the legislative debates was on ways of protecting the employer from the economic havoc of jurisdictional strikes.[22] But it does not follow from statements condemning the economically deleterious effects of inter-union strife that Congress intended an employer to have no say in a decision that may, practically, affect his business in a radical way. Congress did not expressly focus on the non-neutral employer, but there is nothing in the legislative history that negatives employer standing; [23] and in referring to the "parties

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[20] 93 Cong. Rec. 1845. Cf. also 93 Cong. Rec. 1824 (remarks of Sen. Morse).

[21] H. R. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess., 57 (1947).

[22] See, *e. g.*, 93 Cong. Rec. A1222–A1223 (remarks of Cong. Landis); 93 Cong. Rec. 3424 (remarks of Cong. Hartley); 93 Cong. Rec. 3227–3228 (remarks of Sen. Lucas); 93 Cong. Rec. 4860–4862 (remarks of Sen. Aiken); 93 Cong. Rec. A2251–A2253 (remarks of Sen. Ball). Section 10 (k) protection was also extended to unorganized employees. In the Senate bill, § 8 (b)(4)(D) covered only cases where two unions claimed the same work, but the section was broadened in the Conference Committee to cover conflicts between organized and unorganized employees. See *CBS*, 364 U. S., at 584.

[23] In what is apparently the only time employer participation in the resolution of jurisdictional disputes was explicitly considered, Senator Taft indicated that the employer should be a party to the proceeding:

"Mr. MORREALE [General Counsel, International Hodcarriers, Building, and Common Laborers of America]. . . . I do not think

to the dispute," Congress used terminology that would ordinarily include the employer in cases such as these.[24]

The Court has frequently cautioned that "[i]t is at best treacherous to find in congressional silence alone the

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[compulsory arbitration between the antagonistic unions] should be just by labor itself, but that it should be in combination with industry, because in all those matters, the employers are affected and interested, as well as is labor. I think that the procedure set up should provide for a joint procedure between management and labor.

"The CHAIRMAN [Sen. Taft]. . . . I have no objection to giving both to labor and management the right to arbitrate or address themselves to arbitrating the question."

Hearings on S. 55 before the Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., pt. 3, p. 1467 (1947).

The arbitration provision in the Senate version of § 10 (k) was deleted without explanation in Conference. See n. 27, *infra*.

[24] In construing a statute, the Court has ruled that legislative materials, if "without probative value, or contradictory, or ambiguous," should not be permitted to control the customary meaning of words. *United States* v. *Dickerson*, 310 U. S. 554, 562 (1940). See also *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 260 (1945).

The Court has previously had occasion to construe the term "party" in the National Labor Relations Act, and it has given it a broad and realistic definition. In *Lewis* v. *NLRB*, 357 U. S. 10 (1958), the issue was whether the Board's General Counsel was a "party" who could apply to the Board for the issuance of a subpoena. The General Counsel had obtained subpoenas *duces tecum* and *ad testificandum* to both an employer and a union after an unfair labor practice complaint had been issued; at the hearing on the complaint, the employer and union had moved to revoke the subpoenas on the ground that the General Counsel was not a "party" for purposes of § 11 (1) of the Act which provides that: "The Board, or any member thereof, shall upon application of any party . . . forthwith issue . . . subpoenas . . . ."

The Court noted that the Act does not define the term "party," but it emphasized that the role of the General Counsel was a "major one" in unfair labor practice proceedings. 357 U. S., at 15. The General Counsel was held to be a party because he was "indispensable to the prosecution of the case" and because relegating him to a

adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U. S. 61, 69 (1946). *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235, 241 (1970). It is clear that Congress intended to protect employers and the public from the detrimental economic impact of "indefensible" [25] jurisdictional strikes. It would therefore be myopic to transform a procedure that was meant to protect employer interests into a device that could injure them. In the absence of an "unmistakable directive," the Court has refused to construe legislation aimed to protect a certain class in a fashion that will run counter to the goals Congress clearly intended to effectuate. *FTC* v. *Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968). We conclude, therefore, that these sections were enacted to protect employers who are partisan in a jurisdictional dispute as well as those who are neutral.

Nothing in *NLRB* v. *Radio & Television Broadcast Engineers (CBS)*, *supra*, mandates a different conclusion. Until that case, the Board's practice had been

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lesser status would "overlook the critical role he performs in enforcement of the Act." 357 U. S., at 16. This description is equally applicable to an employer's function in a § 8 (b) (4) (D) proceeding. In *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL–CIO, Local 283* v. *Scofield*, 382 U. S. 205 (1965), the Court went through a somewhat similar analysis of the substantive interests involved at the judicial enforcement stage of an unfair labor practice proceeding, and concluded that a successful "charged" or "charging" party before the Board had a right to intervene in the ensuing Court of Appeals action.

Excluding the employer from participation as a party is inconsistent with the common-law rule that "all persons materially interested in the result of a suit ought to be made parties, so that the court may . . . 'do complete justice.'" *Vetterlein* v. *Barnes*, 124 U. S. 169, 170–171 (1888). *Story* v. *Livingston*, 13 Pet. 359, 375 (1839).

[25] President Truman, 1947 State of the Union Message, 93 Cong. Rec. 138.

to decide against the striking or picketing union unless it was entitled to the work pursuant to a Board certification or a collective-bargaining contract. The Court found the Board to have taken too narrow a view of its task and held that the Board, employing broader, more inclusive criteria with respect to entitlement, must make an affirmative award to one union or the other. In the course of its opinion, the Court referred to § 10 (k)'s phrase "the dispute out of which such unfair labor practice shall have arisen" as having "no other meaning except a jurisdictional dispute under § 8 (b)(4)(D) which is a dispute between two or more groups of employees over which is entitled to do certain work for an employer." 364 U. S., at 579. Again, we have no quarrel with the view that § 10 (k) is designed to decide which union is entitled to the work. But the issue before us is whether the employer is also a party to that dispute and to the proceeding that decides that question. The Court in *CBS* did not have before it a case in which the employer was particularly interested in which union did the work, since it had collective-bargaining contracts with both unions and since both unions were able to do the disputed work with equal skill, expense, and efficiency. The Court recognized that there, *"as in most instances"* the quarrel was of "so little interest to the employer that he seems perfectly willing to assign work to either [union] if the other will just let him alone." *Ibid.* (emphasis added). We have no doubt, therefore, that the Court had no intention of deciding the case now before us.

If employers must be considered parties to the dispute that the Board must decide under § 10 (k), absent private agreement, they must also be deemed parties to the adjustment or agreement to settle that will abort the § 10 (k) proceedings. It is insisted that so holding will encourage employers to avoid private arbitration,

whereas holding union agreement alone sufficient to foreclose Board action will pressure employers to become part of private settlement mechanisms productive of sound result and much swifter decision.

The difficulties with this argument are several. First of all, if union agreements to arbitrate are sufficient to terminate § 10 (k) proceedings, there is no assurance that these private procedures will always be open to employer participation, that an employer will be afforded a meaningful chance to participate, or that all relevant factors will be properly considered.[26]

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[26] The Board has stated its guidelines for resolving jurisdictional disputes:

"The Board will consider all relevent factors in determining who is entitled to the work in dispute, e. g., the skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards, and the AFL–CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business. This list of factors is not meant to be exclusive, but is by way of illustration. . . . Every decision will have to be an act of judgment based on common sense and experience rather than on precedent." *Int'l Assn. of Machinists, Lodge 743 (J. A. Jones Construction Co.)*, 135 N. L. R. B. 1402, 1410–1411 (1962).

The Joint Board award in this case was based solely on the Joint Board's interpretation of a 1917 agreement between the two international unions and a 1924 decision interpreting that agreement. R. 53, 69–70, 73–76. At the time of the dispute, the criteria used by the Joint Board in making awards were: "Decisions and agreements of record as set forth in the Green Book [the Building Trades Department's book of precedents], valid agreements between affected International Unions attested by the Chairman of the Joint Board, established trade practice and prevailing practice in the locality." Art. III, § 1 (a), AFL–CIO Bldg. & Constr. Trades Dept., Plan for Settling Jurisdictional Disputes Nationally and Locally (1965). These criteria were broadened in 1970 by the addition of Art. III, § 1 (f), which provides: "Because efficiency, cost and good management are essential to the well-being of the industry, the Joint Board

Second, the argument for regarding the employer as a dispensable neutral is reminiscent of the position taken by the Board and rejected by the Court in the *CBS* case. There, the Board sought to justify a narrow view of its function and its failure to make affirmative awards as generating pressure to settle or arbitrate privately. As § 10 (k) passed the Senate, it directed the Board to decide the dispute *or* to order arbitration, but the arbitration alternative was deleted in Conference, and the amended bill was passed by the Senate over the strenuous objections of Senator Morse and others.[27] By this amendment, the Court in *CBS* held that Congress had expressed a clear preference for Board decision as compared with compelled arbitration, and that this policy preference must be respected. 364 U. S., at 581–582. Although this Court has frequently approved an expansive role for private arbitration in the settlement of labor disputes, this enforcement of arbitration agreements and settlements has been predicated on the view that the parties have voluntarily bound themselves to such a mechanism at the bargaining table. In both *Carey* v. *Westinghouse Electric Corp.*, 375 U. S. 261, 262 (1964) and *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S., at 238, the employers had acceded to binding arbitration as the terminal step of the grievance procedure. This concession is not present in the instant case; the employers here did not even have a collective-bargaining contract with the Plasterers. Section 10 (k) contemplates only a voluntary agreement as a bar to a Board decision. As in *CBS*, we decline to narrow the Board's powers under § 10 (k) so that employers are

should not ignore the interests of the consumer in settling jurisdictional disputes." AFL–CIO Bldg. & Constr. Trades Dept., Plan for Settling Jurisdictional Disputes Nationally and Locally 8 (1970).

[27] 93 Cong. Rec. 6452–6453; 93 Cong. Rec. 6519 (remarks of Sen. Pepper).

coerced to accept compulsory private arbitration when Congress has declined to adopt such a policy.

There remains the matter of the so-called *Safeway* rule announced by the Board in 1962 [28] and followed since.[29] Under this rule, the Board has held that if one of the unions claiming work effectively renounces its claim, § 10 (k) proceedings are aborted despite legitimate interests an employer may have in securing a Board decision. It is urged that if union agreement prevents a § 10 (k) decision in such a situation, the employer cannot be considered a party to the § 10 (k) dispute when the unions but not the employer have *agreed* upon a method of settlement. As we understand the *Safeway* doctrine, however, when one union disclaims the work, § 10 (k) proceedings terminate, not because all "parties" to the dispute have settled or agreed to settle within the meaning of the statute, but on the ground that, in the words of the Board's brief in this case, "the Board has power, under Section 10 (k), only to hear and determine the merits of a jurisdictional dispute and . . . by definition, such a dispute cannot exist unless there are rival claims to the work. . . ." [30] Concededly, an employer may be a third party to disputes over work assignments, but when

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[28] *Highway Truckdrivers, Local 107* (*Safeway Stores, Inc.*), 134 N. L. R. B. 1320 (1961).

[29] *Int'l Assn. of Bridge Workers, Local 678* (*W. R. Aldrich & Co.*), 145 N. L. R. B. 943 (1964); *Carpet, Linoleum & Soft Tile Layers, Local 1905* (*Butcher & Sweeney Construction Co.*), 143 N. L. R. B. 251 (1963); *Wood, Wire & Metal Lathers Union, Local 328* (*Acoustics & Specialties, Inc.*), 139 N. L. R. B. 598 (1962).

[30] Brief of NLRB 30 n. 23. In a case interpreting the *Safeway* doctrine, the Board stated that § 10 (k) is limited "to situations involving competing claims between *rival* groups of employees, and [was] not designed to require the Board to arbitrate a dispute between a union and an employer when no . . . competing claims [of another union] are involved." *Carpet, Linoleum & Soft Tile Layers, Local 1905* (*Butcher & Sweeney Construction Co.*), 143 N. L. R. B. 251, 255–256 (1963) (emphasis in original).

the other two parties settle their differences and one union declines the work assigned to it, the inter-union conflict that §§ 8 (b)(4)(D) and 10 (k) were designed to eliminate disappears. A § 10 (k) hearing is a comparative proceeding aimed at determining which union is entitled to perform certain tasks. Its function evaporates when one of the unions renounces and refuses the work. Similarly, the applicability of § 8 (b)(4)(D) is premised on conflicting claims of unions or groups of employees for the same job; absent such an actual conflict, it would be futile to proceed under that section unless the employer replaces the disclaiming employees by a new third group of employees when they reject the work assignment, and the disfavored union resumes picketing.

If union settlement followed by disclaimer ends the § 10 (k) case, some of the argument about the employer's party status becomes academic; for whether the employer is a party or not, the two unions alone can prevent a Board decision. But recognizing the employer's party status insures his right to participate when the unions do not agree and the Board must come to a decision. Further, the Board's *Safeway* rule applies only where the inter-union conflict is effectively settled and the employer no longer faces conflicting claims to the work. As this case demonstrates, the Board does not apply the *Safeway* rule to unimplemented agreements to arbitrate between the unions alone, and it does not consider it applicable where employees continue on the job after their international union loses an arbitration proceeding and renounces the work.[31] These *de facto* disputes are real,

[31] *Carpenters Local 1849* v. *C. J. Montag & Sons, Inc.*, 335 F. 2d 216, 221 (CA9 1964); *Bldg. and Construction Trades Council of Las Vegas, Local 525* (*Charles J. Dorfman*), 173 N. L. R. B. 1339 (1968). The Board has also held that a union cannot avoid a § 10 (k) determination by a disclaimer of interest in presently

and they deserve Board resolution if the purposes of § 10 (k) are to be achieved. Cf. *CBS, supra,* at 579–580.

The Court of Appeals would extend the *Safeway* rule to foreclose Board decision where the two unions, but not the employer, have agreed to arbitrate; inter-union agreement was deemed equivalent to effective disclaimer by one of the unions. This view ignores the narrow view the Board has taken of the *Safeway* rule. It also fails to recognize the problem arising where a local union or group of employees continues to do work assigned by the employer despite agreement or disclaimer by their parent body. It makes little difference to the picketing union that there has been a "settlement" or an agreed-upon method of deciding the dispute as long as it is barred from enjoying the results of such a theoretical resolution. In the instant case, the Board held a § 10 (k) hearing for the simple reason that a live unresolved jurisdictional dispute between unions and employer in fact existed.

Our conclusion evinces no hostility to voluntary settlement of disputes and is wholly consistent with federal policy with respect to voluntary arbitration. In other contexts, where challenged conduct poses an arbitrable dispute under a collective-bargaining contract but is also an unfair labor practice within the jurisdiction of the Board, the Board will, as a matter of policy, defer to the arbitral settlement, although it is not bound to do so

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representing the employees in question, *United Mine Workers (Turman Construction Co.)*, 136 N. L. R. B. 1068 (1962), and it has ignored explicit disclaimers when it has questioned a representative's authority to disclaim work, *Millwrights' Local 1113 (Brogdex Co.)*, 157 N. L. R. B. 996, 1002 (1966). See also *Local 1291, Int'l Longshoremen's Assn. (Pocahontas Steamship Co.)*, 152 N. L. R. B. 676 (1965), enforced, 368 F. 2d 107 (CA3 1966), cert. denied, 386 U. S. 1033 (1967); *Bricklayers' Local 2*, 152 N. L. R. B. 278, 282 (1965); *Bldg. and Construction Trades Council of Las Vegas, Local 525 (Charles J. Dorfman)*, 173 N. L. R. B. 1339 (1968).

by the LMRA. See 29 U. S. C. § 160 (a); *Carey* v. *Westinghouse Electric Corp.*, 375 U. S., at 272; *NLRB* v. *Strong*, 393 U. S. 357, 360–361 (1969); *NLRB* v. *Acme Industrial Co.*, 385 U. S. 432, 438 (1967). Although the Board is not statutorily required to honor arbitration awards in such situations, it often defers to them if the arbitrator has considered the alleged unfair labor practice. *Spielberg Mfg. Co.*, 112 N. L. R. B. 1080 (1955); *International Harvester Co.*, 138 N. L. R. B. 923 (1962), enforced *sub nom. Ramsey* v. *NLRB*, 327 F. 2d 784 (CA7 1964). But again, such deference is in the context of voluntary arbitration. In the case before us, the LMRA *requires* that the Board defer only when all of the parties have agreed on a method of settlement; when there has been such an agreement, the Board cannot ignore or override the result of that settlement procedure. In the present case, however, it is claimed the Board must defer when less than all the parties to the dispute have agreed to arbitrate.

Reversed.